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Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-604

STATE OF NEW JERSEY and HOWARD YEAGER, The Principal Keeper of the State Prison at Trenton, New Jersey,

Petitioners,

vs.

UNITED STATES OF AMERICA *ex rel.*, JOHN WILLIAM SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATE OF NEW JERSEY and HOWARD YEAGER, The Principal Keeper of the State Prison at Trenton, New Jersey,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Third Circuit which reversed an order of the United States District Court for the District of New Jersey denying a writ of habeas corpus.

Questions Presented

1. Whether the grand jury was constitutionally impaneled?

2. Whether the procedures employed by the Essex County Jury Commissioners were reasonably designed to insure representative grand juries?

3. Whether the Essex County Jury Commissioners systematically discriminated against any recognizable group within the community?

4. Whether the harmless error rule can be employed in instances in which grand juries have been improperly selected?

Jurisdiction

On the night of July 12, 1967, defendant, while operating a taxicab in the City of Newark, was ordered to a halt by two Newark police officers for committing certain traffic offenses. An altercation then ensued resulting in the present charges.

On August 17, 1967, the Essex County Grand Jury returned two indictments, No. 2677-66 and No. 2678-66, charging defendant with the crime of assault and battery contrary to the provisions of N.J.S. 2A:90-4. Defendant entered pleas of not guilty, and on September 29, 1967, filed a motion to dismiss the indictments claiming that they were constitutionally defective.[1] Ninety-eight similar motions were made by other defendants and were consolidated with that of the defendant. Extensive hearings were conducted by the Honorable James R. Giuliano, Assignment Judge of Essex County, who reserved decision on defendant's motion.

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[1] Defendant also contended that the oath administered to grand juries was unconstitutional. This contention was found to be without merit by the New Jersey Superior Court, the New Jersey Supreme Court and the United States District Court. The Court of Appeals never reached the issue.

On March 22, 1968, defendant was brought to trial before the Honorable Joseph Lyons and a jury. The jury thereafter returned a verdict of guilty with respect to Indictment No. 2677-66 but was unable to reach a verdict with respect to Indictment 2678-66.

On May 15, 1968, the trial judge sentenced defendant to a term of not less than two nor more than three years in the New Jersey State Prison. On July 16, 1968, the Honorable James R. Giuliano denied defendant's pre-trial motion in a lengthy opinion. *State* v. *Smith*, 102 N. J. Super. 325, 246 A. 2d 35 (Law Div. 1968) (Appendix F, p. 74a).

Petitioner thereafter filed a timely notice of appeal to the Superior Court, Appellate Division. On October 14, 1969, the New Jersey Supreme Court certified the matter on its own motion and on March 16, 1970, unanimously affirmed defendant's conviction, *State* v. *Smith*, 55 N. J. 476 (1970), 262 A. 2d 868 (Appendix E, p. 58a). On December 7, 1970, defendant's application for a writ of certiorari to this Court was denied.

Defendant thereafter filed a petition for a writ of habeas corpus in the United States District Court. That petition was denied by the Honorable Lawrence A. Whipple in a lengthy unreported opinion (Appendix C, p. 23a). Defendant thereafter filed a timely appeal to the Court of Appeals for the Third Circuit. That Court subsequently reversed and remanded the matter to the District Court (Appendix A, p. 25a). This application under 28 U.S.C. § 1254(1) followed.

Statement of the Case

This is an application for a writ of certiorari to review a judgment of the Court of Appeals for the Third Circuit

which reversed an order of the United States District Court denying a writ of habeas corpus.

The following constitutes a brief synopsis of the testimony taken at the hearing on defendant's motion in the New Jersey Superior Court. Much of the evidence presented at the hearing concerned the practices and procedures employed by the Essex County Jury Commissioners and their staff in obtaining names for grand jury service. The "key man" system was employed in formulating the grand jury list at the time defendant was indicted but this practice has since been discontinued.[2] Names of prospective grand jurors were solicited from various organizations, churches, labor unions, telephone directories and other civic groups including the National Association for the Advancement of Colored People (T365-5 to 10).[3] Special efforts were made to obtain the names of Negroes willing to serve on the grand jury through contacting local labor unions, prominent Negro citizens and organizations[4] (T377-19 to 25; T380-15 to 18; T381-3 to 7; T382-1 to 3; T383-3 to 9).

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[2] At present, both grand and petit jurors are selected by the same procedures. Voter resigstration lists and city directories are used.

[3] Page references refer to page and line of the transcript of the hearing in the New Jersey Superior Court.

[4] Among these sources are the Rotary and Kiwanis Clubs, labor groups, several Negro judges, and State, County, and municipal employees, the NAACP, the Urban League, churches with predominately Negro membership, large and small corporations (T365-8 to 10; T377-19; T380-15 to 18; T380-22 to 24; T381-6 to 7; T382-1 to 7; T381-18 to 21). Also, telephone directories and voter registration lists are used (T365-23 to 24; T388-21 to 25). Defendant's bald assertion below that Commissioner Howie was personally acquainted with the groups from which names were solicited is not supported by the record. In fact, the reverse is true (T365-15 to 17).

The Jury Commissioners and members of their staff testified that their efforts were directed at obtaining a representative cross section of the community in selecting names for grand and petit jury service (T383-3 to 9; T485-7 to 10; T592-18 to 20; T490-8). No person was excluded or disqualified from jury service by reason of race.

During the hearing, an attempt was made to determine the composition of the grand and petit juries by the use of statistics and what is commonly known as a "random sample" technique. For the purpose of determining the composition of the grand jury, the New Jersey Superior Court considered the master lists from May 1966 to May 1967 (T612). The lists totaled 1,200 names and by selecting every fourth name, a sample of 300 persons was obtained to determine race, sex, residence and occupational background of jury panels (T612-22 to 24).

The sample indicated that of the names on the grand jury master list, six per cent were Negro (by sample only) (T1138-16). Comparing this percentage to population figures contained in the 1960 census, Dr. Dick, a statistician testifying for the defense, concluded that Negroes were underrepresented on the grand jury panels (T1095-20).

It is apparent from Dr. Dick's testimony that his analysis did not take into consideration several important factors which, if considered, would have the effect of substantially reducing the disparities found by him. Dr. Dick was unable to state what percentage of the identifiable Negro group was eligible for jury duty (T1138-22). He admitted that he did not consider the number of Negroes exempted or excluded based on hardship, commission of a crime, or responsibility for dependent children (T1215-25; T1216-3).[5]

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[5] The State offered evidence that a much greater percentage of persons arrested in Newark was Negro (T1449-15 to 21). Comparable evidence as to person convicted of a crime could not be obtained since State officials were not permitted to make such designations (T1456-1 to 9). It is conceded that this proof is highly speculative and its probative value is questionable. The Superior Court did not allude to it in its lengthy opinion.

In fact, it was conceded that consideration of these factors would have affected the defense's statistical analysis (T1234-15). Furthermore, Dr. Dick failed to consider that from 1960 to 1966, the vast majority of people (60 per cent) failing to respond to questionnaires resided in Newark, the municipality with the largest black population in Essex County.

On June 28, 1968, the Superior Court in a lengthy opinion, denied defendant's motion stating as follows:

> Defendant's statistician admittedly did not consider all of the qualifications for jury service or exemptions from jury service. Namely, defendant's statistician did not consider the percentage of Negroes, women, residents of Newark and persons of lower economic status between the ages of 21 and 74 years who were disqualified from jury service because they were: (1) not a resident of this State for at least two years; or (2) not a resident of Esesx County; or (3) convicted of a crime, or (4) not able to read, write and understand the English language; or (5) they had a mental or physical disability which would prevent them from properly serving as jurors. N.J.S. 2A:69-1. Likewise, defendant's statistician did not consider the percentage of persons in each of the aforesaid groups who would be exempt from jury service by virtue of the fact that they were (1) a member or employee of a police force or fire department, or (2) a member of the state or federal military forces, or (3) employed as a school teacher, or (4) entrusted with the care and custody of a minor child and jury service would interfere with the care required of such child. N.J.S. 2A:69-2. These factors would significantly decrease the number of qualified persons in each of the aforesaid groups. Therefore, since the validity of these statis-

ties is so tenuous, this court finds them inconsequential on this motion.

The Supreme Court of New Jersey thereafter unanimously affirmed the trial court's decision and defendant's subsequent application for a writ of certiorari was denied by the Supreme Court of the United States.

Defendant then applied for a writ of habeas corpus in the United States District Court.[6] The District Court denied that application in a lengthy opinion holding that the evidence submitted by defendant was not sufficient to sustain his burden of proving that the Essex County Jury Commissioners had purposefully or negligently excluded members of various identifiable groups from grand or petit jury service. The Court found that the procedures employed by the Jury Commission obviated the danger of purposeful discrimination and that the disparities disclosed by defendant's proofs revealed underrepresentation of some groups on the jury panels, but not a systematic pattern of exclusion or discrimination. Defendant then filed an application for a certificate of probable cause to the Court of Appeals for the Third Circuit. The application was granted.

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[6] The parties initially agreed that they would rely upon the record of the State court proceedings including the briefs filed in the Supreme Court of New Jersey. At approximately four o'clock on the day prior to the scheduled argument date, counsel for petitioner served the State with a lengthy supplemental brief. Argument was heard on the following day, but the State was permitted to file a supplemental brief thirty days thereafter. After the State filed its supplemental brief, petitioner sought leave to introduce the 1970 census into evidence. The State objected but requested that it be permitted to offer additional evidence if the Court granted petitioner's application. Despite the fact that the 1970 census was never formally admitted as part of the record, petitioner's brief below heavily relied upon it.

In reviewing the case, the Court of Appeals amended the District Court's findings of fact. More specifically, the Court found that twenty-five per cent of Essex County consisted of Negroes at the time that the defendant was indicted (Appendix B, p. 14a). Prior to this finding, the courts hearing this case relied upon statistics presented by defendant's statistician which indicated that seventeen per cent of Essex County consisted of Negroes (Appendix B, p. 14a). Placing heavy reliance on this fact, the Court of Appeals reversed the District Court's order denying the writ of habeas corpus.

REASONS FOR DENYING THE WRIT

POINT I

The grand and petit juries were constitutionally impaneled.

A. Introduction

Prior to trial, defendant moved before the Assignment Judge of Essex County to dismiss the indictments pending against him upon the ground that the grand and petit juries were improperly and unconstitutionally impaneled. More specifically, he claimed that the procedures employed by the Essex County Jury Commissioners in the selection of grand and petit jurors resulted in a systematic and deliberate exclusion of Negroes, women, residents of the City of Newark, and persons of the lower economic classes. An extensive hearing was thereafter conducted. After reviewing all of the evidence and the applicable case law, the Superior Court Judge concluded that the practices and procedures employed by the Jury Commissioners in the selection of grand and petit jurors were not viola-

tive of the Federal Constitution. *State* v. *Smith*, 102 N. J. Super. 325, 246 A. 2d 35 (Law Div. 1968). This factual finding was unanimously affirmed by the Supreme Court of New Jersey *State* v. *Smith*, 55 N. J. 476, 262 A. 2d 868 (1970) and was upheld by the United States District Court in a carefully considered opinion.

The Court of Appeals for the Third Circuit then reviewed this case. In arguments before the Third Circuit, it was the position of the State and apparently also that of defendant that the record in the State court was sufficient to resolve the issues presented in the instant case and that an evidentiary hearing was unnecessary. Nevertheless, on the basis of the record before the Superior Court, the Court of Appeals for the Third Circuit amended the finding of fact. The three judge panel found that twenty-five per cent of the population of Essex County consisted of Negroes. Heavily relying on this fact, the Court of Appeals reversed and remanded this matter to the District Court.

B. Grand and Petit Juries Need Not Reflect Proportional Representation of the Various Identifiable Groups in the Community.

Defendant argued below that the Essex County grand and petit jury rolls did not represent a fair cross section of the general population of the County. It was further argued that those responsible for the preparation of the jury lists had an affirmative duty to make certain that eligible members of identifiable groups within the community were not excluded (Pb15).[7]

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[7] The pertinent New Jersey statutory provisions are found in N.J.S. 2A:68-1, *et. seq.* N.J.S. 2A:69-1 provides "every person, male and female . . . shall be a citizen of this State for at least two

(Footnote continued on following page)

The State does not quarrel with the general principles set forth in defendant's brief below for it is a well-established principle of our jurisprudence that juries as instruments of public justice must be truly representative of the community. See *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Strauder* v. *West Virginia*, 101 U. S. 303 (1880). Nevertheless, this does not mean that every jury must contain representatives of all the economic, social, religious, racial political, and geographical groups of the community. *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414, 424 (3rd Cir. 1955).

In an unbroken line of cases, the courts have uniformly rejected the contention that approximately proportional representation of the various identifiable groups within the community is required. See *Brown* v. *Allen*, 344 U. S. 428, 497-98 (1953); *United States* v. *DiTommaso*, 405 F. 2d 385, 390 (4th Cir. 1968), *cert.* denied 394 U. S. 934 (1969); *Carmical* v. *Craven*, 314 F. Supp. 580, 583-84 (N. D. Calif. 1970); *United States* v. *Cohen*, 275 F. Supp. 724 (D. Md. 1967), aff'd 405 F. 2d 385 (1967), *cert.* denied 394 U. S. 934 (1968); *United States* v. *American Oil Co.*, 249 F. Supp. 130, 138 (D. N. J. 1968); *State* v. *Rochester*, 54 N. J. 85, 88 (1969); *State* v. *Forer*, 104 N. J. Super. 481, 492-95 (Law Div. 1969). As stated by this Court in *Swain* v. *Alabama*, 380 U. S. 202, (1965):

(Footnote continued from preceding page)

years; over 21 and under 75 years of age; a resident of the county from which he shall be taken; shall not have been convicted of a crime . . . Such person shall be able to read, write and understand the English language and shall not have any mental or physical disability which will prevent him from properly serving as a juror." N.J.S. 2A:68-1 provides that the Supreme Court shall appoint two jury commissioners for each county.

> [T]*he defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire of jury roll from which petit jurors are drawn.* (Citations omitted). Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. 'Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color proportional limitation is not permissible.' (Citations omitted). We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as ten percent. (380 U. S. at 208, 85 S. Ct. at 829). (Emphasis added).

This proposition has been reiterated in every case dealing with jury discrimination and its applicability to the issues presented in the instant matter admits of no doubt. Proportional representation may be the ideal, but it can be achieved only rarely, and only in regard to some but not all of the relevant criteria. "It stands to reason that in a body limited in number, such as a jury panel or a grand or petit jury, accurate and complete representation of all of the groups and categories that comprise a modern heterogeneous community is an absolute impossibility." See *United States* v. *DiTommaso, supra,* at 390. To afford substantial representation of some categories such as sex, race, religion, political persuasion and economic grouping, it may well be necessary to sacrifice ideal representation.

While the record below reflects certain imbalances in the racial composition of the master grand jury rolls, defendant did not prove systematic exclusion or intentional or negligent discrimination on the part of the Jury Commissioners, in whole or in part. Defendant's argument below that disproportion, without more, is sufficient to render a jury selection system unconstitutional, is wholly without merit. This Court has held that where, for example, tax rolls are used as the source for juror's names, the inevitably consequent racial imbalance in representation will not render such a system unconstitutionally exclusionary. *Brown* v. *Allen, supra.* Likewise, selection of a jury from volunteers does not establish impermissible exclusion of a class, even assuming that fewer persons from a certain class volunteer. *Fay* v. *New York,* 332 U. S. 261, 277-78 (1947); *Hoyt* v. *Florida,* 368 U. S. 57, 61 (1961).[8]

Defendant's argument that the Jury Commissioners failed in their affirmative duty to familiarize themselves with population trends in the County is also untenable. Similar claims have been considered and rejected by this court. See *Swain* v. *Alabama, supra,* at 829, Fn. 4.

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[8] As was stated by District Court Judge Frankel in *United States ex rel. Epton* v. *Nenna,* 318 F. Supp. 899, 903 (S.D.N.Y. 1970), a legislature "could rationally have concluded that volunteers for the solemn responsibilities of grand jurors would be more reliable. devoted and effective than compelled members." Also see the recent decision of the United States Court of Appeals for the Second Circuit in *United States ex rel Otis Chestnut* v. *McGrath,* (Docket No. 356-60) which produced percentage disparities much more substantial than those in the instant case.

The cases cited by defendant below in support of his argument are totally inapposite.[9] These cases merely

[9] In *Cassell* v. *Texas*, 339 U. S. 282 (1950), the Supreme Court held that purposeful proportional limitation of groups on jury panels is unconstitutional. The Court went on to state that another ground for reversal was that the jury commissioners chose jurymen only from those people with whom they were personally acquainted. They also testified that they knew of no qualified Negroes. "The statements of the jury commissioners that they chose only whom they knew, and that they know no eligible Negroes in an area where Negroes made up so large a proportion of the population prove the intentional exclusion that is discrimination in violation of the petitioner's constitutional rights." *Id.* 290. A similar jury selection system was found objectionable by the Supreme Court in *Hill* v. *Texas, supra,* for the same reason. There, the jury commissioner testified "I personally did not know of a qualified Negro that I thought would make a good grand juror." *Id.* 402. In addition, the subjective qualifications for jurors were improperly applied since the jury commissioners blindly assumed that all Negroes were illiterate and made no attempt whatever to determine the veracity of this belief. *Id.* at 404. Similarly, in *Turner* v. *Fouche,* 396 U. S. 346 (1970), the Court found that 96 per cent of persons determined not to be "morally upright" and "intelligent" by jury commissioners were Negroes. This "purge" of Negroes from the jury list was found to be unsupported by any objective testing by the commissioners. *Id.* 300. This fact coupled with the jury commissioner's total failure to determine whether Negroes were in fact qualified to serve as jurors vitiated the "informal arrangement" under which the commissioners operated. *Id.* at 360-61. *Davis* v. *Davis,* 361 F. 2d 770 (5th Cir. 1966) is distinguishable for the same reason. There, the Court was confronted with a situation involving almost total exclusion. The jury commissioners testified that they selected only persons whom they knew and that they had no Negro acquaintances. Also, racial designations were placed adjacent to the names of prospective jurors. *Id.* 774-75. See also *Wichter* v. *Peyton,* 405 F. 2d 725 (4th Cir. 1969) where the jury commissioners selected names primarily among individuals known to them" (*Id.* at 727) and *Smith* v. *Texas, supra,* where the Court stated "Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintances, discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them." *Id.* at 132.

stand for the principle, not contested here, that jury commissioners may not limit their selection of jurors to only persons with whom they are acquainted unless they affirmatively attempt to familiarize themselves with members of all identifiable groups within the community. Here the Essex County Jury Commissioners selected jurors' names from a wide variety of sources. They further testified that as a general rule, they were not members of the organizations from which names were solicited, but that they attempted to select groups whose respective memberships reflected a cross-section of the community.

Defendant's reliance below on *Brooks* v. *Beto*, 366 F. 2d 1 (5th Cir. 1966) was clearly misplaced. There, unlike here, the jury commissioners were required to apply subjective standards in selecting persons for jury service. Obviously, such a system requires that jury commissioners familiarize themselves with persons from all groups to determine their eligibility. Also unlike here the Court was confronted with a discriminatory system of long standing which had been recognized as such in the past. Defendant did not present such evidence in the instant case. Also lacking here is proof that the commissioners had an opportunity to discriminate.

The Jury Commissioners' alleged unfamiliarity with the composition of the general population in Essex County, while unfortunate, clearly did not constitute a deprivation of petitioner's constitutional rights. The Jury Commissioners and their staff do not hold graduate degrees in statistics or sociology and their offices are not equipped to conduct periodic investigations into current population trends. It is totally unreasonable to expect that the percentage of each identifiable group in the community will be substantially the same on a jury list as within the gen-

eral population. The inclusion of exact proportionate representation of every group is not required under the Constitution and is not practically feasible. As noted by the United States District Court in *United States* v. *Cohen*, *supra*, at 743:

> We were asked, in effect, to compare and contrast percentage variations in connection with each identifiable group within the community, and to conclude that the juries in these cases were not in fact drawn from a pool of persons broadly representative of the community because the jury list and the juries do not mirror the community with exact statistical perfection. To so conclude would be to fly in the face of the principles of decided case law. We have no case, pertaining to State juries and decided solely on a constitutional issue basis, or pertaining to federal juries and decided in the light of the federal court system's more exacting supervisory responsibilities, in which a federal court, from the vantage point of twenty-twenty hindsight, has decided that a jury selection system has been negligently and therefore unlawfully administered because such administration, while achieving substantial representation within all the identifiable community groups has also produced partial deviation from complete statistical balance within a few of those group categories.

In the final analysis, the Orwellian scheme urged by defendant in the instant case, is neither feasible nor desirable. Our Constitution and the cases decided under it neither compel nor suggest the presence of "big brother" at the court house steps selecting potential jurors on the

basis of such a non-germane criterion as race.[10] Purposeful inclusion is as much an affront to the Constitution as deliberate exclusion. See *Cassell* v. *Texas*, 339 U. S. 282 (1949). Also see Note, 42 N.Y.U. L. Rev. 364 (1967); Note, 41 Tulane L. Rev. 473 (1967), criticizing *Brooks* v. *Beto*, 266 F. 2d 1 (5th Cir. 1966), cert. denied 386 U. S. 975 (1966).[11] Such a contrived system would be repugnant to the basic notions of due process of law.

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[10] Willingness to devote a substantial amount of time to community affairs surely is a more germane criteria than race. To approve of defendant's argument would supplant relevant criteria and substitute for them consideration of historically unconstitutional classifications. Jurors who have been selected by race may well believe that they were chosen because race is somehow relevant to the process of deliberation and that each race is expected to be partisan along racial lines. See Note, 74 Yale L. J. 919, 924-25 (1965). Absent any strong demonstrable need for racial classifications, the essence of the constitutional infirmity is the racial classification itself, see *Edwards* v. *California*, 314 U. S. 160, 185 (1941). See also *Anderson* v. *Martin*, 375 U. S. 399 (1964); *Hamm* v. *Virginia State Board of Education*, 230 F. Supp. 156 (E. D. J. 1964), aff'd 379 U. S. 19 (1964); *Bittker*, "The Case of the Checkerboard Ordinance," 71 Yale L. J. 1307 (1962).

[11] Defendant cited many cases supporting the rule that race may be a consideration in achieving the goal of integrated schools. See for example *Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir. 1970); *Hobson* v. *Hansen*, 269 F. Supp. 401 (D. C. 1967), aff'd in *Smuch* v. *Hobson*, 408 F. 2d 175 (D. C. Cir. 1969). But see *Gilliam* v. *School Board of City of Hopewell*, 345 F. 2d 325 (4th Cir. 1965) vacated on other grounds 382 U. S. 103 (1965); *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (10th Cir. 1964), *cert.* denied 380 U. S. 914 (1965); *Bell* v. *School City of Gary*, 324 F. 2d 209 (7th Cir. 1963), *cert.* denied 377 U. S. 924 (1964); *Griggs* v. *Cook*, 272 F. Supp. 163 (N. D. Ga. 1967), aff'd 384 F. 2d 705 (5th Cir. 1967). These cases, as well as *Brooks* v. *Beto*, *supra*, are distinguishable because they all involved attempts to correct the results of prior discriminatory practices. Here, the record is barren of any evidence indicating a past pattern of exclusion.

In the instant case, the Jury Commissioners vehemently denied that racial considerations entered into their selection of potential grand and petit jurors. The record is barren of any evidence indicating that different standards or qualifications were applied to certain identifiable groups in order to exclude them. The overall percentage disparity reflected no studied attempt to include or exclude members of any identifiable group within the community. Undoubtedly, greater effort should be made to insure that all groups in the community are fully represented, but "an imperfect system is not equivalent to purposeful discrimination." *Swain* v. *Alabama, supra,* at 830.

POINT II

Defendant failed to prove that the Essex County Jury Commissioners deliberately and systematically excluded from jury service members of identifiable groups within the community.

A. Introduction

Much of defendant's argument below was devoted to the question of whether a discriminatory intent must be shown in order to present a *prima facie* case of jury discrimination. It was argued that exclusion by reason of neglect as well as intentional discrimination is constitutionally prohibited. Nevertheless, decisions of this Court as well as those of lower federal courts have generally required proof of a "deliberate and systematic exclusion". See for example *Akins* v. *Texas,* 325 U. S. 398 (1945); *Strauder* v. *West Virginia, supra; United States* v. *Bennett,* 409 F. 2d 888 (2nd Cir. 1969), *cert.* denied 396 U. S. 852 (1969), rehearing denied, 396 U. S. 94 (1969), *United States* v. *Bough,* 350 F. 2d 1 (2d Cir. 1966), *cert.* denied, 385 U. S.

961 (1966). That is not to say, however, that an evil motive must be proved. "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand." *Smith* v. *Texas,* 311 U. S. 128 (1940) at 132. See also *Glasser* v. *United States,* 315 U. S. 60, 86 (1942).

A careful review of the relevant cases discloses that successful attacks on jury selection procedures have always involved "(1) a deliberate practice of total exclusion, (2) a deliberate practice of token exclusion, or (3) deliberate interference with an otherwise valid procedure." *Smith* v. *Yeager,* Civil No. 1733-70 (D. N. J. June 30, 1971) at 6-7. Thus, absent a showing of intentional discrimination, there must be clear and convincing evidence of the utilization of arbitrary and capricious procedures by jury commissioners. In other words, if the procedures employed by the jury commissioners in the instant case, as applied, were not reasonably related to the goal of selecting representative juries, the State of New Jersey concedes that defendant's attack must prevail notwithstanding the complete paucity of any evidence of intentional and deliberate discrimination.

The New Jersey Superior Court, the New Jersey Supreme Court and the United States District Court all concluded that the procedures employed by the Essex County Jury Commissioners were reasonably designed to insure representative juries and that the disparities shown by petitioner were minor. Thus, the District Court stated that the evidence presented by defendant "disclosed no act, whether intentional or negligent on the part of those responsible for the mailing of the questionnaires that departed from" the valid procedures employed. *Smith* v. *Yeager,* at 6.

The Third Circuit disagreed. Placing heavy reliance on *Alexander* v. *Louisiana*, —— U. S. —— 31 L. Ed. 2d 536 (1972), this panel found that an opportunity to discriminate existed in the instant case and that the Essex County Jury Commissioners availed themselves of this opportunity. Nevertheless, *Alexander, supra* is distinguishable. In *Alexander*, the questionnaires distributed to grand jurors included a space for indication of race.[12] Here, no such opportunity to discriminate existed.

In determining whether the procedures employed in the instant case were reasonable, this Court must recognize that states should be afforded broad latitude in formulating their own jury selection systems. See *Fay* v. *New York*, 332 U. S. 261, 287-90 (1947). See also Justice Frankfurter's concurring opinion in *Akins* v. *Texas, supra*, at 423-24. *Cassell* v. *Texas, supra*, at 291. This principle is well recognized and is applicable here. *Brown* v. *Allen, supra*, at 473-74.

It is submitted that defendant failed to prove intentional discrimination or negligent exclusion.

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[12] This Court has heard several cases where, as in *Alexander*, jury commissioners obviously had the opportunity to discriminate. In *Whitus* v. *Georgia*, 385 U. S. 545 (1967), the names of prospective jurors were selected from tax digests which were segregated and from letters which were placed adjacent to the name of each juror selected. In *Norris* v. *Alabama*, 294 U. S. 587 (1935), the defendant proved that a large percentage of Negroes were qualified, and that none had ever been called for jury service over an extended period of time. In *Labat* v. *Bernet*, 365 F. 2d 698 (5th Cir. 1966) and *Smith* v. *Texas, supra*, evidence produced by the defense indicated that qualified persons were purposely excluded from jury service. Clearly, these cases are inapposite to the instant case.

B. The "key man" System Employed In The Selection of the Grand Jury List Was Not Discriminatory and Did Not Deprive Petitioner of His Constitutional Rights.

The grand jury panel in the instant case was formulated under a system which is commonly referred to as the "key man" method. Defendant argued below that the "key man" system of grand jury selection employed in the instant case excluded members of various identifiable groups within the community and thus was violative of his constitutional rights. More specifically, it was argued that the system discriminated against Negroes.

The "key man" system has been in extensive use in many of the states and has withstood constitutional attack in the following cases. See *Scales* v. *United States*, 367 U. S. 203 (1961); *United States* v. *Butera*, 410 F. 2d 564, 573 (1st Cir. 1970); *Sanders* v. *United States*, 415 F. 2d 621, 623-24 (5th Cir. 1969); *Mobley* v. *United States*, 379 F. 2d 768, 773 (5th Cir. 1967); *Pope* v. *United States*, 372 F. 2d 710, 721-24 (8th Cir. 1967); *United States* v. *Hoffa*, 349 F. 2d 20, 29 (6th Cir. 1965); *Padgett* v. *Buxton-Smith Mercantile Co.*, 283 F. 2d 597, 599 (9th Cir. 1960), *cert.* denied 365 U. S. 828 (1961). This system is particularly appropriate in the light of the traditional role of the grand jury. Members of the grand jury generally serve for a much more extended period of time than do members of the petit juries. The grand jury acts as a sword so that those who are suspect of wrongdoing may be properly brought to trial, and as a shield to protect the people from arbitrary prosecution. See *State* v. *Sibilia*, 88 N. J. Super. 546, 212 A. 2d 869 (Cty. Ct. 1965). Moreover, the grand jury possesses the power and authority to conduct general investigations with respect to matters of public concern. See *In re Addonizio*, 53 N. J. 107, 248 A. 2d 531 (1968). In New Jersey the

grand jury may investigate upon its own motion, and in addition to indictments for crimes, it may return presentments upon conditions of public interest even though no violation of a penal statute is found. See *In re Camden County Grand Jury*, 10 N. J. 23, 65-66, 89 A. 2d 416, 428. See also *Blair* v. *United States*, 250 U. S. 273, 282 (1919); *Hale* v. *Henkel*, 201 U. S. 43, 62 (1906). A state has considerable latitude in the type of grand jury system it may establish and the scope and breadth of its role. *Cf. Lem Woon* v. *State of Oregon*, 229 U. S. 586 (1912); *Hurtado* v. *California*, 110 U. S. 516 (1883).

The selection of members of a grand jury from a pool of public minded citizens willing to devote substantial time and effort to the community is not unreasonable.[13] See for example *Moore* v. *New York*, 333 U. S. 65, 568 (1948); *Fay* v. *New York*, 332 U. S. 261, 284-86 (1947), rehearing denied, 332 U. S. 261 (1947). Interest in public issues and devotion to community service constitute reasonable criteria in selecting citizens for grand jury participation. There is nothing in the Constitution or in our jurisprudence which forbids such a selection procedure as long as an attempt is made to solicit from a broad range of community groups representing all segments of the population.

The record below is barren of any evidence indicating that the "key man" system was employed in such a manner as to systematically and deliberately exclude Negroes. It

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[13] "Blue Ribbon" juries were present in the earliest periods of common law. See Thayer, "The Jury and Its Development," 5 Harv. L. Rev. 249, 300 (1892). Property qualifications for the common juror in English law was itself an aspect of the search for juries of "blue ribbon" caliber. See Goebel and Naughton, Law Enforcement in Colonial New York, 21 467 (1944); Morris, Government and Labor in Early America, 506, 522 (1946).

is uncontradicted that there was no discrimination in choosing the groups and organization from which names were solicited. In fact, special efforts were made to get lists of names from groups of exclusive black membership. Jury Commissioner Howie testified that the master grand jury roll was formulated without regard to racial origin, since he considered it a non germane criterion. The only exclusionary standards applied were those contained in N.J.S. 2A:69-1 and N.J.S. 2A:69-2.[14]

Questionnaires were sent to public minded civic organizations whose memberships included substantial numbers of persons belonging to the very identifiable groups which petitioner asserts were excluded. In summary, defendant's proofs fell far short of revealing an attempt to systematically exclude members of various identifiable groups within the community.

POINT III

Changes in the law dictate that this Court reconsider the applicability of the harmless error rule in grand jury discrimination cases.

The Constitution of the United States guarantees criminal proceedings which are fair; not free of error. Thus, this Court has held that reversal of a conviction is not always an appropriate remedy when an error has been made. Specifically, this Court has repeatedly upheld the principle that errors, even of constitutional proportions, do not vitiate an otherwise valid conviction, when the impact on the jury's determination is harmless beyond a

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[14] However, Jury Clerk, Concetta Tuscano, testified that some persons were excused by reason of extreme hardship.

reasonable doubt. *Milton* v. *Wainwright*, 40 L. W. 4782 (June 22, 1972); *Harrington* v. *California*, 395 U. S. 250 (1969); *Chapman* v. *California*, 386 U. S. 18 (1967).

That is not to say that the harmless error rule has universal applicability. But a *per se* rule of reversal must be based upon an overriding and incontestable societal justification. When a petit jury finds the facts fairly and impartially, the truth is suppressed by a reversal of the accused's conviction. And suppression of the truth debases the criminal process.[15]

This Court has never expressly stated that the harmless error rule is inappropriate in grand jury discrimination cases. However, the clear implication of many decisions is that the concept does not apply in such instances.[16]

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[15] The remedy in grand jury discrimination cases is to quash the indictment against the defendant. However, in the instant case, quashing the indictment may in effect set the defendant free. The statute of limitations for indicting the defendant in New Jersey has expired. There is no statutory provision in New Jeresey which provides that the statute of limitations is tolled by a pending prosecution. Furtherfore, the majority of jurisdictions which do not have statutes suspending the operation of the limitations period during a pending case have held that a defendant cannot be reindicted. See 90 A. L. R. 458. Thus, it is conceivable that the defendant will be exonerated of all charges against him on the basis of a technicality and not on the merits of the case. Consequently, the State of New Jersey contends that reversal of conviction rather than mere quashing of the indictment is the effect of the Third Circuit's decision.

[16] The implications of several grand jury discrimination cases is that the harmless error rule does not apply. In *Cassell* v. *Texas*,

(Footnote continued on following page)

The failure of this court to apply the harmless error rule in grand jury cases clearly stems from the inadequacy of other legal remedies to cure discriminatory practices.[17] See *Carter* v. *Green County, supra; Smith* v. *Texas, supra.* The equal protection clause of the fourteenth amendment demands that the right of Negroes to serve on

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(Footnote continued from preceding page)

339 U. S. 282 (1950), Justice Jackson, in a dissenting opinion, advocated the use of the harmless error rule in cases involving allegations of grand jury discrimination. The majority opinion in *Cassell* did not expressly reject Justice Jackson's argument, but seemed to suggest that the proper selection of a grand jury venire is a constitutional right which, if violated, automatically warrants reversal of a conviction. Other decisions have also applied that principle. See also *Smith* v. *Texas,* 311 U. S. 128 (1940); *Hill* v. *Texas,* 316 U. S. 400 (1942); *Strauder* v. *West Virginia,* 101 U. S. 303 (1880).

[17] Defendants, in challenging the grand jury selection process are not in reality protecting their own right. Rather, they are protecting the rights of third parties—Negroes who have been denied an equal opportunity to serve on the grand jury. This proposition is supported by the fact that the defendant in the instant case is challenging the racial composition of the grand jury venire which contained six per cent Negroes. In his arguments below, defendant did not focus on the fact that the grand jury which indicted him contained 13 per cent Negroes (3 out of 23). (T200-22 to 24; 258-23 to 25). Further, in grand jury cases, the challenge has always been raised against the composition of the venire of prospective jurors rather than the actual grand jury which indicted the defendant. Certainly, if the purpose of the grand jury challenge is to vindicate the right of the defendant, the grand jury which in fact indicted the defendant would be of some relevance. Other forms of analysis which follow in the footnotes and the text will further illustrate that the purpose of grand jury challenges is to protect the rights of third parties.

grand juries be more abstract legal principle.[18] See *Smith* v. *Texas, supra,* at 130. Unfortunately, from the inception of the Fourth Amendment until the 1960's there had been no effective method by which minority groups could challenge the selection procedures employed by officials to recruit potential grand jurors.[19] Thus, the only means to protect the rights of Negroes as a class was to permit those accused of crimes to challenge the grand jury selection process.

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[18] This Court has felt it crucial to the functioning of our democracy that minority groups be given an equal opportunity to serve on grand juries. The reason for this concern are twofold. First, democracy implies the right to participate in the administration of law as well as participation in the process by which the law is made. Thus, for our democracy to be truly representative, all members of our society must be afforded an equal opportunity to serve on investigative bodies such as the grand jury. See *Smith* v. *Texas, supra.* Denying any group the opportunity to participate in the administration of the law "is practically a brand upon them . . . an assertion of their inferiority." *Strauder* v. *West Virginia,* at 308. By placing this brand on Negroes, prejudice against this group is stimulated. Thus, "for racial discrimination to result in the exclusion of otherwise qualified groups not only violates our constitution and the laws enacted under it, but is at war with our conception of democratic society and a representative government." *Smith* v. *Texas, supra,* at 130.

[19] Congress has provided means other than quashing an indictment to enforce the right of Negroes to serve on grand juries. First, those who exclude members of minority groups from the grand jury are subject to a fine of not more than $5,000. 18 U.S.C.A. § 243. Second, persons deprived of the right to serve on a grand jury can pursue a civil remedy such as an injunction. However, until recently, these remedies were almost totally neglected by allegedly excluded groups. (Now, class action suits are being prosecuted to secure injunctions against those who control the grand jury selection process). Thus, in the past, these remedies could not be considered to be *effective.* Consequently, quashing indictments was the only *effective* means by which the right of Negroes to serve on a grand jury could be enforced.

Recently, however, another effective means of attacking grand jury selection procedures has received judicial recognition and approval. Specifically, class action suits have been successfully employed by members of the black community to challenge the failure of grand jury commissioners to properly select prospective jurors. See *Carter* v. *Green County,* 396 U. S. 320 (1970); *Turner* v. *Fouche,* 396 U. S. 346 (1967). Due to the increasing popularity of class action suits and the growing sums of money which have become available for this type of litigation, it is only logical to assume that grand juries will be challenged by this method as the need arises.

There can be no dispute that class action suits truly represent the aggrieved parties (Negroes who are deprived the right to serve on the grand jury). Now that such suits are being prosecuted with increasing frequency, the necessity of reversing a defendant's conviction in order to police grand jury selection no longer exists. Thus, it is now senseless to continue to forbid the application of the harmless error rule in these cases.

It has been argued that one accused of a crime is deprived of due process of law when a grand jury venire does not reflect a cross-section of the community and that an indictment against him should be quashed on this basis. *Carter* v. *Greene County, supra,* at 330; *Smith* v. *Texas, supra.* The theory supporting this argument is that one has a right to be tried by a tribunal of his peers and that a jury lacking the appropriate proportion of Negroes deprives an accused of time honored constitutional rights.

Nevertheless, it is difficult to perceive in what possible manner an accused is prejudiced when an improperly se-

lected grand jury indicts, but a properly impaneled petit jury convicts.[20] The purpose of a grand jury is to accuse. It determines whether there is sufficient evidence to bring the defendant to trial and charges the accused in accordance with the proofs. Only a majority of the grand jury (12 out of 23) need agree that charges be made against a defendant. However, these charges are at trial presumed to be false. They are not even admissible as evidence.

Here, the lower courts hearing this matter have concluded that the petit jury was constitutionally selected.[21] After hearing the evidence, that jury, unanimously found the defendant guilty beyond a reasonable doubt. Considering these circumstances, it is inconceivable that any grand jury, however constituted, would not have found sufficient evidence to indict the defendant. Certainly, failure to properly select a grand jury can be viewed as harmless under these circumstances.

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[20] It has been argued that the function of a grand jury is to protect an individual from malicious prosecution. The State, it is said, can abuse its power if a proportional number of minority citizens are not included on the grand jury. This argument, however, is founded on the erroneous assumption that the fact finding ability of a grand jury is impaired when a proportional cross-section of the community is not represented on the grand jury. Thus, following this argument to its logical conclusion, a grand jury with twenty per cent minority citizens in a county with a minority population of fifty per cent could not fairly find the facts, while a grand jury with ten per cent minority citizens in a county with a minority population of ten percent could fairly find the facts. Certainly, it is ludicrous to assert that the proportion of minority citizens on a grand jury is determinative of whether the state has abused its power in indicting a minority defendant.

[21] The Court of Appeals did not decide the question of whether the jury was properly impaneled. However, the Law Division of the New Jersey Superior Court, the Appellate Division, the Supreme Court of New Jersey and the District Court of the United States all concurred in finding that the jury in the instant case was properly impaneled.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully submits that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

(Filed—July 18, 1972.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1650

JOHN WILLIAM SMITH,

Appellant,

v.

HOWARD YEAGER, Warden, New Jersey State Prison; GEORGE F. KUGLER, JR., Attorney General and Chief Prosecutor of the State of New Jersey; HONORABLE JAMES R. GIULIANO, Assignment Judge for the Superior Court for the County of Essex, State of New Jersey

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued February 8, 1972

Appendix A

Before KALODNER, HASTIE and ROSENN, *Circuit Judges.*

ROSENN, *Circuit Judge.*

Appellant has challenged the jury selection procedures used to impanel the grand and petit juries of Essex County, New Jersey, which were instrumental in indicting and convicting him of assault and battery.[1] He contends that both the "key man" system used to select the grand jury venires, and the system based on voting lists and city directories used to choose the petit jury venires, were constitutionally defective because they excluded disproportionate numbers of Negroes, women, working class, and residents of Newark.

1. THE BACKGROUND

Appellant is a Negro male. He bases his claims on both the equal protection and due process guarantees of the

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[1] Appellant was one of approximately 94 defendants arrested during the civil disturbances in Newark, New Jersey in 1967 who filed timely motions under former New Jersey Rule, N.J.R.R. 3:3-2(a) (b) (now N.J.R.R. 3:6-2) to dismiss the indictments against them based, inter alia, on the improper selection of the grand jury. *See*, State v. Forer, 104 N. J. Super. 481, 250 A. 2d 431 (1969). (Any defendant who has not made such a timely motion may be barred from raising the issue on appeal or by habeas corpus.) Because of common questions of law and fact, the Superior Court Law Division ordered consolidated argument on the various motions which lasted several days. Of the group of 94, 71 of the indictments were dismissed, 16 defendants were found guilty, 6 were found not guilty and one failed to appear in court. We have on appeal only Smith's petition. In addition to the evidence developed before the Superior Court, the District Court for the District of New Jersey requested certain additional information, primarily census figures, at the time of the habeas corpus hearings.

fourteenth amendment to the Constitution, but because of our disposition of this case, we need consider only one question: did the "key man" system employed in Essex County, New Jersey, invidiously discriminate in the selection of Negro grand jurors so as to deny appellant the equal protection of the law.[2]

All of appellant's claims were rejected by the state courts in *State* v. *Smith*, 102 N. J. Super. 325, 246 A. 2d 35 (1968), *aff'd.* 55 N. J. 476, 262 A. 2d 868 (1970), *cert. denied*, 400 U. S. 949 (1970), and his habeas corpus petition[3] has been rejected by the District Court for the District of New Jersey in an unreported opinion.

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[2] Besides attacking the composition of the grand and petit juries, appellant has also contended on this appeal that the oath required of all grand jurors in New Jersey is illegal and operates to deny him due process. Our disposition of this case in no way reflects a final judgment on the merits of the claims with regard to the selection of the petit jury or the grand jury oath. The recent Supreme Court decision of Alexander v. Louisiana, 40 L. W. 4365 (4/4/72), rejected the application of most due process standards to the selection of state grand juries, and so we reject appellant's arguments made on such grounds here. *But see* Peters v. Kiff, 40 L. W. 4819 (6/20/72). A grand jury is not necessarily unfair or impartial because of a disproportionate representation of classes of citizens in the community. *See* United States ex rel. Chestnut v. Criminal Court of the City of New York, 442 F. 2d 611 (2d Cir. 1971), *cert. denied*, 404 U. S. 856 (1971) (*see* note 21 *infra*). For a discussion of the appropriateness of due process objections to the composition of a jury venire, *see, Note, The Defendant's Challenge to Racial Criterion in Jury Selection: A Study in Statutory Due Process and Equal Protection*, 74 Yale L. J.

[3] Appellant is presently on bail pending appeal pursuant to the order of this court dated July 19, 1971. The conditions attached to that order and the impending commitment of appellant are sufficient restraints to meet the "in custody" requirement of the federal habeas corpus statute. United States ex rel. Rybarik v. Maroney, 406 F. 2d 1055, 1056 n. 1 (3d Cir. 1969). *See also*, Jones v. Cunningham, 371 U. S. 236 (1963).

Appendix A

These opinions relied heavily on *Swain* v. *Alabama*, 380 U. S. 202 (1965), for the proposition that the appellant had to show something more than steady under-representation of the various groups to make out his prima facie case of a denial of equal protection. The Superior Court of New Jersey decided after a full hearing that it was incumbent on appellant to show a deliberate, systematic discrimination against members of his race. 246 A. 2d at 46. The Supreme Court of New Jersey affirmed that test. The United States District Court conducted a thoughtful and thorough review of the cases and the facts of Smith's habeas corpus petition, concluding that appellant had to show: (1) a deliberate practice of total exclusion; (2) a deliberate practice of token inclusion; or (3) a deliberate interference with an otherwise valid procedure. It decided that none of the three situations had been shown and that appellant had failed to make out even a prima facie case. It attributed the under-representation of certain classifications of citizens, including Negroes, not to purposeful discrimination, but to the imperfections in the selection process.

In other words, the Superior Court and the District Court believed that it was not sufficient for the appellant's prima facie case to show that the consistent under-representation of Negroes on the grand jury was the likely result of a course of deliberate action by the Jury Commissioners of Essex County in seeking out "key men" who would supply names for grand jury service. We disagree.

For almost one hundred years the Supreme Court has made clear that:

> The right to a trial by jury is guaranteed to every citizen of [the state] by the Constitution of that

> State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. *Strauder* v. *West Virginia,* 100 U. S. 303, 308 (1880).

As such, there should be a truly representative crosssection of the community on a grand or petit jury. *Carter* v. *Jury Commission of Greene County,* 396 U. S. 320, 330 (1970); *Smith* v. *Texas,* 311 U. S. 128, 130 (1940), although there need not be proportional representation of each element of the population entitled to serve. *Cassell* v. *Texas,* 339 U. S. 282, 286-87 (1950). However, "[o]nce the State chooses to provide grand and petit juries, whether or not constitutionally required to do so [footnote omitted] it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias. [footnote omitted]. . . ." *Carter* v. *Jury Commission of Greene County, supra,* at 330.

When one is willing to serve, and deemed fit by the state to serve,[4] he cannot be excluded by the consideration of unacceptable or improper criteria. If such exclusion

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[4] All of the groups appellant contends are under-represented are required to serve as jurors in New Jersey, N.J.S.A. 2A:69-1 and 2A:72-7. However, this broad spectrum of jurors has not been required by the Supreme Court, and the states may make reasonable classifications limiting jury service. Hoyt v. Florida, 368 U. S. 57, 62 (1961).

takes place depriving a defendant of members of his or her race,[5] sex,[6] or economic class,[7] then there may be a denial of equal protection.

The need of a cross-section of the community on a grand jury is particularly important because of its unique functions in the judicial process. On the one hand, that "body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962). On the other, it serves to investigate wrong-doing and invoke

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[5] *See, e.g.*, Alexander v. Louisiana, 40 L. W. 4365 (4/4/72); Jones v. Georgia, 389 U. S. 24 (1967); Cassell v. Texas, 339 U. S. 282 (1950); Patton v. Mississippi, 332 U. S. 463 (1947).

A white man may also object to the exclusion of Negroes from state grand or petit juries. Peters v. Kiff, 40 L. W. 4819 (6/20/72).

[6] Ballard v. United States, 329 U. S. 187 (1946) (exclusion of women illegal under federal jury selection scheme and proscribed under Supreme Court's supervisory power over the federal courts). *But see*, Hoyt v. Florida, 368 U. S. 57 (1961).

[7] Thiel v. Southern Pacific R. Co., 328 U. S. 217 (1946) (wage earners cannot be barred from federal juries); *cf.* Labat v. Bennett, 365 F. 2d 698 (5th Cir. 1966, *cert. denied*, 368 U. S. 991 (1967) (where state requires that members of the working class serve on juries, they cannot be eliminated through granting of large numbers of hardship excuses, particularly where their exclusion also leads to extreme limitations on the number of Negroes who can serve).

the judicial process against those who have broken society's laws. *United States* v. *Neff*, 212 F. 2d 297, 301 (3rd Cir. 1954). Although a state need not provide a grand jury, *Hurtado* v. *California*, 110 U. S. 516, 538 (1884), it cannot proceed with one that was discriminatorily selected, once begun, fatally infects all subsequent proceedings against those who have been denied the equal protection of the laws. *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Hernandez* v. *Texas*, 347 U. S. 475, 482 (1934); *Akins* v. *Texas*, 325 U. S. 398, 401-02 (1945).

II. The "Key Man" System

The "key man" system, which is the focus of this appeal, was the product of the latitude given the New Jersey Jury Commissioners in the selection of their jury lists. The state's statutes set forth qualifications for jurors, N.J.S.A. 2A:69-1,* and exemptions from service, N.J.S.A. 2A:69-2-

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*N.J.S.A. 2A:69-1 reads: "Every person, male and female, summoned as a grand juror, and every petit juror returned for the trial of any action of a civil or criminal nature in any of the courts of this State, shall be a citizen of this State for at least 2 years; over 21 and under 75 years of age; a resident of the county from which he shall be taken; shall not have been convicted of a crime; and shall not, at the time of his selection, be a person who through his office, position or employment is either directly or indirectly connected with the administration of justice. Such person shall be able to read, write and understand the english language and shall not have any mental or physical disability which will prevent him from properly serving as a juror."

4,[9] and preclude any discrimination in selection based on race, color, creed, national origin or ancestry. N.J.S.A. 2A:72-7. But, the method by which the jury commissioners arrive at the list of qualified names they are required to

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[9] Most of the exemptions from jury service are contained in N.J.S.A. 2A:69-2, which in 1967 included the following significant categories:

> "The following persons shall be exempt from service on any panel of grand or petit jurors:
>
> a. Members or employees of police forces, State or local.
>
> b. Members of any fire department or fire patrol, volunteer or paid.
>
> . . .
>
> d. Regulary licensed and practicing physicians and dentists in this State.
>
> e. Members of State or Federal military, naval or air forces . . .
>
> f. School teachers . . .
>
> g. Any person who has the actual physical care and custody of a minor child and who gives written notice to the jury commissioners of the county of his residence that jury service would interfere with the care required for such child.
>
> . . .
>
> i. Telegraph and telephone operators and linemen . . ." N.J.S.A. 2A:69-3 permits certain juries not to be selected from the jury lists, and N.J.S.A. 2A:69-4 exempts from jury service those who have served as grand or petit jurors within the past year.

produce under N.J.S.A. 2A:70-1[10] has, until recently,[11] been left to their discretion. *State* v. *Forer,* 104 N. J. Super. 481, 250 A. 2d 431 (1969); *State* v. *Grundy,* 136 N. J. L. 96, 54 A. 2d 793, 796-7 (1947).

Prior to 1962, the Jury Commissioners of Essex County had been fulfilling their duties by drawing names from the county voting list. That year, the Assignment Judge for Essex County determined that the system was not working. He found that it did not produce enough Negroes, women, working class persons, or people from the City of Newark. He ordered the inclusion of such people, and the jury commissioners switched their method of selection to accommodate his wishes.

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[10] N.J.S.A. 2A:70-1 reads as follows:

> "The jury commissioners of each county shall . . . make 2 lists, alphabetically arranged and consecutively numbered, of persons liable to jury duty, having regard to the just distribution of jury service among those persons qualified therefor in the various wards and municipalities, and shall be designated respectively the 'grand jury list' and the 'petit jury list.' The number of persons named on the grand jury list shall at no time be less than 125 nor more than 300, to be determined by the assignment judge of the Superior Court for the county . . ."

[11] On March 7, 1969, subsequent to the events in this case, Chief Justice Weintraub of the New Jersey Supreme Court directed that "in the future the grand jury lists be selected in the same manner and from the same pool of names as petit jurors." State v. Rochester, 54 N. J. 85, 253 A. 2d 474, 477 (1969). This decision was in response to the growing dissatisfaction with non-random selection of grand jurors, particularly through the use of a key man system.

Appendix A

The theory of the "key man" system they adopted was to find strategically located persons in the county who could suggest capable people for jury duty. Theoretically, by selecting key men located in all the different communities in Essex County, and by taking into account appropriate economic and demographich factors, the key man system was intended to produce well qualified individuals of all races, classes and communities for service on the grand jury.

However, the key man system in Essex County was not an effective system.[12] The jury commissioners had no settled method for selecting their key men. It was haphazard and uncertain at best, with absolutely no restraint on the subjective judgment of the jury commissioners. During the period from 1962-64, the Commissioners attempted to correct the lack of Negro names and solicited juror recommendations from some Negroes, including two judges and the director of the Newark Urban League, as well as from civic organizations and other people in the county. This special appeal produced about 250 Negro names. One Commissioner, however, conceded at the hearing in this case that the special effort soliciting Negro names was not continued after 1964. The names that were

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[12] The federal judicial system has recognized the problems with the key man system and done away with it as a method of selecting federal grand and petit juries. Report of the Committee on the Operation of the Jury System, 42 F. R. D. 353, 360-61 (1967). *See also,* H.R. 1076, 90th Cong. 2d Sess., The Jury Selection and Service Act of 1968, 1968 U. S. Code, Cong., and Admin. News 1792, 1794. P.L. 90-274, 82 STAT. 53, 28 U.S.C. §1861 et seq. (1970).

the fruits of this special effort were exhausted by 1966-67 when the events in question took place.[13]

At least one of the jury commissioners testified he did not know the size of the component parts of the county's population, and that he had no idea of what type of grand jury list his work was producing. This lack of knowledge exacerbated the problems with the key man system. Such conduct was in dereliction of the responsibilites that courts have required jury commissioners to take them under the equal protection clause in order to provide a reasonable cross-section. *Carter* v. *Jury Commission of Greene County, supra; Carmical* v. *Craven*, 457 F. 2d 582 (9th Cir. 1971). It is also particularly disturbing in view of the affirmative action incumbent upon the jury commissioners following the Assignment Judge's 1962 order. *Turner* v. *Fouche*, 396 U. S. 346 (1970); *James* v. *United States*, 416 F. 2d 467 (5th Cir. 1969), *cert. denied*, 397 U. S. 907 (1970); *Brooks* v. *Beto*, 366 F. 2d 1 (5th Cir. 1966), *cert. denied*, 386 U. S. 975 (1967), *rehearing denied*, 386 U. S. 1043 (1967). Thus, this inaction was an abdication of an important element of a jury commissioner's role when it was patent that only careful tuning and retuning of the key man system would result in appropriate representation.

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[13] One of the Essex County's Jury Commissioners, Melvin Howie, testified that he thought that in 1966-67 grand juror selection was done solely from voting lists. (N.T. 366). However, Concetta Toscano, head clerk of the Jury Commissioners' staff, testified repeatedly that during 1966-67 each grand jury list was made up primarily from lists of names submitted by the Jury Commissioners. (N.T. 470-94). The judge who presided at the hearing found that the "key man" system was in fact in operation in 1966-67, 246 A. 2d at 46, and the State of New Jersey so concedes in its brief to this court. (Appellee's Brief, at 6).

Appendix A

The Jury Commissioners apparently realized the inadequacy of their procedure because they asked the Chief Clerk of their office to use the petit jury list drawn from the voting list to add names of people from *Newark*, the city with the largest Negro population in the county, to the grand jury list.[14] This supplementation raises at least the inference that the Jury Commissioners knew the key man system was operating ineffectively.[15]

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[14] This supplementation generally amounted to between five and twenty names (N.T. 489), so that almost all the names were submitted by the Jury Commissioners or were drawn from prior grand jury lists whose members had not served. (N.T. 474).

After the initial list was assembled, questionnaires were sent out by the clerk's office to those on the list. Those who did not reply or who were exempted from jury service under the statute, were not put on the list. (N.T. 472, 482-85). While there is no direct testimony on the question, the number of people so excluded from the grand jury list does not seem to have been significant, and does not explain the low representation of Negroes.

[15] This supplemental procedure and the general selection of the petit jury lists is potentially suspect because the Jury Commissioners persisted in using the voting lists after they were told by the Assignment Judge that the lists were not producing a cross-section of the community. While it is one thing to use a random selection procedure on the good faith assurance that it will produce a cross-section of the community, it is a far different problem if the facts reveal that the Jury Commissioners persisted in using that method when they knew it was not going to produce the requisite cross-section. Such a set of facts, if proved, might well raise a question of a denial of equal protection. *See* Broadway v. Culpepper, 439 F. 2d 1253, 1257 (5th Cir. 1971); King v. Cook, 298 F. Supp. 584 (N. D. Miss. 1969).

Appendix A

This haphazard system produced significant under-representation of Negroes. Appellant first attempted to show that as a mathematical probability it was impossible for so few Negroes to show up on a grand jury list absent discrimination. While such information may lend credibility to an over-all presentation, statistical improbabilities are not sufficient to establish a prima facie case. *Alexander* v. *Louisiana,* 40 L. W. 4365, 4367 (4/4/72); *Whitus* v. *Georgia,* 385 U. S. 545, 552 n.2 (1967).[16] However, the same figures illustrate the kind of significant under-representation which is required for appellant's prima facie case. The Essex County key man procedure from May 1966 to May 1967 produced four separate, consecutive grand jury lists of 300 people each of which had

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[16] Appellant's statistician stated that the likelihood of having only 6% of a grand jury made up of Negroes was less than one in one million in the county's Negro population was approximately 27%. Even assuming the actual Negro population was smaller than that, reducing the statistical improbability, we doubt that there was much difference between this case and Alexander v. Louisiana, 40 L. W. 4365 (4/4/72), and Whitus v. Georgia, 385 U. S. 545 (1967), in which petitioners showed that the statistical probability of grand venires with the proven percentage of Negroes was less than one in 20,000.

While we agree with the Superior Court that the us of statistics in equal protection cases can be misleading, they do serve a useful purpose in pointing up potential problems which require some kind of explanation. *See generally,* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 Harv. L. Rev. 338 (1966).

only an average of 6% Negro names. By contrast, the county was approximately 25% Negro at that time.[17]

These figures are as serious as the disparities disapproved by the Supreme Court in recent cases. In *Alexander* v. *Louisiana*, supra, at 4366, the selection procedure produced a grand jury venire that was 6.75% Negro in a county with 21% Negro population. *Turner* v. *Fouche*, supra, found inadequate representation when 37% of the grand jury list was Negro in a county with 60% Negro population. While the parties in this case have quibbled over how this court should interpret such percentage diminution,[18] significantly, approximately three-quarters of the

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[17] The Superior Court relied on a figure of 17% Negroes in the Essex County population, 246 A. 2d at 49. However, this figure, which was based on the 1960 census, is in considerable dispute and would seem to be inaccurate. A projection of population growth made by the New Jersey Department of Conservation and Economic Development estimated that in 1966, 27.3% of Essex County was Negro. (Appellant's Appendix 50a, Exhibit D-31). At the habeas corpus hearing, the 1970 census figures, showing Negroes making up about 30% of the county's population, were introduced by appellant. (Appellant's Appendix 49a) Taking into account the various inaccuracies in estimating an appropriate figure, we believe a 25% figure is justified.

[18] Appellant has argued that percentage diminution should be assessed on a comparative rather than absolute basis. *See, e.g.*, Alexander v. Louisiana, 40 L. W. 4365, 4367 (4/4/72). In other words in this case, in which the Negro population in the county was approximately 25% and representation on the grand jury list approximately 6%, appellant would argue that there is 76% under-representation rather than 19% under-representation. On this basis, he would conclude that the under-representation is more serious

(Footnote continued on following page)

adults in a segment of the community numbering approximately 260,000 at the time in question seem to have been excluded from consideration for jury service. "In the face of the commissioners' unfamiliarity with Negroes in the county and the informality of the arrangements by which they sought to remedy the deficiency in their knowledge in compiling the jury list, we cannot assume that inquiry would not have led to the discovery of many [more] qualified Negroes." *Turner* v. *Fouche*, supra, at 360.

However, the the disparity between population and jury representation is not the sole consideration in this litigation. The Supreme Court's most recent jury discrimination decision, *Alexander* v. *Louisiana*, supra, reaffirmed the conclusion reached in *Swain* v. *Alabama*, supra, that under-representation alone was not sufficient to show a

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(Footnote continued from preceding page)

than, for instance, in Turner v. Fouche, 396 U. S. 346 (1970), in which the county's Negro population was 60%, but grand jury representation 37%. That absolute difference, 23%, is larger than the disparity in Essex County, but comparatively, it is only a 38% diminution, which is smaller than the Essex County figure.

However, the comparative approach reaches absurd results in cases like Dow v. Carnegie-Illinois Steel Corporation, 224 F. 2d 414 (3d Cir. 1955), *cert. denied*, 350 U. S. 971 (1956), which considered racial discrimination in the Western District of Pennsylvania, where the Negro population at the time was 4.4% of the total, and Negro jury participation ranged as low as 2% of the jury list.

These problems with comparing statistics illustrate the utility of presenting some probability analysis along with the actual percentages.

prima facie case of discrimination.[19] *Alexander* required that there be an opportunity for racial discrimination, 40 L. W. at 4367. The parties vigorously dispute whether the key man system offered the opportunity for racial discrimination contemplated by the Supreme Court.

The State of New Jersey contends essentially that one general principle which can be abstracted from all relevant Supreme Court decisions is that each fact situation included a specific step when the jury commissioners could look at a list, or at a man's face, to separate people on the basis of race and produce a monochromatic list. Because that opportunity is not present here, the state asserts no opportunity to discriminate exists. We disagree.

The state is correct in asserting that the Supreme Court's cases have almost invariably faced instances of direct discrimination potentially designed to exclude Negroes. For instance, *Alexander* v. *Louisiana*, supra, is paradigmatic of the recent cases which have confronted improper exclusion of Negroes from jury service.[20] In

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[19] The 5th Circuit has stated that it will rely on the objective results of the jury selection procedure for plaintiff's prima facie case. Ford v. White, 430 F. 2d 951, 954 (5th Cir. 1970). However, whether that means that court will not look at various forms of procedural defects in deciding the merit of the prima facie case is doubtful. *See, e.g.*, Broadway v. Culpepper, 439 F. 2d 1253 (5th Cir. 1971).

[20] *See, e.g.*, Turner v. Fouche, 396 U. S. 346 (1970) (jury selection required commissioners to eliminate all potential jurors who were "unintelligent" or not "upright citizens," and commissioners failed to ascertain any information about other potential jurors who were unknown to them); Carter v. Jury Commission of Greene

(Footnote continued on following page)

Alexander the jury commissioners selected names of potential jurors from a variety of sources and then mailed out questionnaires. The questionnaires included a space for indication of race. When these were returned, the commissioners culled from the pile those people who were either unqualified or exempt from service. Finally, they selected "at random" names for the grand jury venire.

However, these facts do not delineate the breadth of those decisions. The Supreme Court requires those who select jury panels to follow a procedure—a course of conduct—which does not operate to discriminate in the selection of jurors on racial grounds. *Avery* v. *Georgia*, 345 U. S. 559, 561 (1953); *Hill* v. *Texas*, 316 U. S. 400, 414 (1942). The opportunity to discriminate as required for a prima facie case of discrimination is shown when a party:

> demonstrates that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. *Turner* v. *Fouche*, *supra*, at 360.

The opportunity to discriminate in *Alexander* occurred because the jury commissioners had the ability to invoke

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(*Footnote continued from preceding page*)

County, 396 U. S. 320 (1970) (jury commissioner to prepare a list of persons of good moral character and sound judgment whom they deemed well qualified to serve as jurors); Sims v. Georgia, 389 U. S. 404 (1967); Jones v. Georgia, 389 U. S. 24 (1967); Whitus v. Georgia, 385 U. S. 545 (1967) (the last three cases all concern the selection of juries from tax digests which at least in part listed the taxpayer's race).

such subjective selection. The possibility of identifying each potential juror only provided the factual information on which the tainted subjective decision could be based. Decisions rendered by other courts of appeals make clear that the opportunity to discriminate by the exercise of subjective judgment which can in some way consider race is sufficient in conjunction with the requisite under-representation to make a prima facie case.

In *Labat* v. *Bennett*, 365 F. 2d 698 (5th Cir. 1966), *cert. denied*, 386 U. S. 991 (1967), the 5th Circuit concluded that the systematic granting of excuses to day laborers in New Orleans Parish was discriminatory. There was no general state policy in favor of systematically excluding day laborers, and the court found the exercise of the jury commissioner's subjective judgment unacceptable since it was common knowledge that a large percentage of all day laborers in the Parish were Negro. The inability to match individual jurors and their race was unimportant so long as the effect of the system was to produce a significant constant under-representation of Negroes.

More recently, the 9th Circuit has held that the administration of inaccurate intelligence tests that eliminated disproportionate numbers of Negroes from the jury rolls in Alameda County, California, was a violation of a defendant's right to equal protection. *Carmical* v. *Craven*, supra. This decision amply illustrates that there need be no direct discrimination against individual jurors. It was a sufficient exercise of discretion for the jury commissioners to select a test which the state conceded did

not test intelligence and which was culturally biased against members of minority groups.[21]

In addition, the State of New Jersey has contended that there must be a showing of deliberate discrimination in making out a prima facie case but there is no support for that view. While actual animus against Negroes will obviously be an element in estabilshing a prima facie case, *Carmical* v. *Craven,* supra, at 588, the issue of good faith need not enter into consideration. Protestations of such good faith will not aid the state in discharging its burden, *Alexander* v. *Louisiana,* supra, at 4367; *Whitus* v. *Georgia,* supra, thereby making the issue of motive or intent irrelevant in assessing a challenge to the jury selection system.

This case reveals an equivalent opportunity for racial discrimination. There is an unavoidable inference that certain key men were much more likely to produce names of whites, while others were more likely to produce names of Negroes. Further, the actions of the Jury Commissioners indicate that they obviously knew that Negro key men and Negro organizations were the source of most

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[21] A recent case which upheld the constitutionality of a jury selection system in spite of a substantial under-representation of Negroes, Puerto Ricans, and the poor is United States ex rel. Chestnut v. Criminal Court of the City of New York, 442 F. 2d 611 (2d Cir. 1971), *cert. denied,* 404 U. S. 856 (1971). New York County's voluntary grand jury service law did not give any state official an opportunity to discriminate as contemplated in Alexander v. Louisiana, 40 L. W. 4365 (4/4/72). The petitioner in that case conceded not only that there was no purposeful discrimination but also that there was no exclusionary device employed. Once the process began at no point was there an elimination of potential jurors through a step controlled by the subjective judgment of the jury commissioners.

Negro names. Their failure to continue to pursue such sources after 1964 amounts to an elimination of the only significant source of Negro grand jurors in Essex County. Whether such conduct was intentional or simply negligent, its results were reasonably foreseeable to jury commissioners if they were exercising due diligence in the conduct of their duties. Moreover, the discontinued use of Negro key men was in direct contravention of the Assignment Judge's order to produce a more balanced grand jury list. Although the commissioners were not responsible for the racial division of society in Essex County, they were at least responsible for considering it when they chose a method to select jurors.

We hold, therefore, that the appellant in this cause of action has made out a prima facie case of a denial of equal protection.

The situation in Essex County is closely analogous to the jury selection procedures challenged in *Salary* v. *Wilson,* 415 F. 2d 467 (5th Cir. 1969). The court noted that the problem with that selection system probably arose from the failure of the key men to supply adequate numbers of Negro names. As in the instant case, there was no direct discrimination by the commissioners themselves. However, that was not a sufficient answer. The court held that they had an affirmative duty to provide a representative cross-section of the community for jury service; and they could not shift the responsibility to the key men.

The State of New Jersey argued at the hearing in this case that the disparity between the overall Negro population and the number on the grand jury lists must be approached warily because it does not take into account the

various disqualifications and disabilities, to which the Negro community is more vulnerable than the white community. However, the state adduced scant evidence on the issue, and presented nothing to dispel the serious questions of discrimination raised with regard to the key man system. As the 5th Circuit held in *Salary,* the failure of the white key men and major civic organizations to produce Negro names did not rebut a prima facie case of discrimination. Therefore, in the absence of evidence to the contrary, we must assume that there are qualified Negroes available for jury service. *Alexander* v. *Louisiana,* supra, at 4365; *Turner* v. *Fouche,* supra, at 360. On this record, "there is no room for inference that there are not among [the Negro population] householders of good moral character, who can read and write, qualified and available for grand jury service." *Hill* v. *Texas,* 300 U. S. 400, 404 (1942). *Accord, Cassell* v. *Texas,* supra, at 289; *Patton* v. *Mississippi,* 332 U. S. 463, 468 (1947).

Although a jury commissioner has a thankless, underpaid job,[22] often done out of a sense of civil responsibility, he cannot perform his duties wholly oblivious to his responsibilities. He is charged with producing a cross-section of the community the state deems appropriate for jury service. It is a necessary consequence of that responsibility that he know the population which comprises his community. In the absence of a randomized proce-

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[22] A jury commissioner's salary in Essex County in 1967 was $900. N.J.S.A. 2A:68-7. The only qualifications for the post of jury commissioner are that the person not hold any other public office (except that of sheriff) and not be licensed to practice law in New Jersey. A county's two jury commissioners cannot be of the same political party. N.J.S.A. 2A:68-1.

dure, he must conform his method of selection to a system that will produce jury lists reasonably approximating that cross-section. When such a cross-section is not produced, and the circumstances offer an opportunity for discrimination, it is then his burden to justify his inability to fulfill his duties.

While a jury selection system without racial consideration is much to be desired, the realities of the present, however, cannot be ignored. For the moment, only appropriate consideration of race can correct racial imbalance. *Turner* v. *Fouche, supra; James* v. *United States, supra.*

The appellant has established at least a prima facie case. The state has failed to rebut it. The grand jury impanelled on the basis of such a procedure did not meet constitutional standards for equal protection and the indictment it returned against appellant should have been dismissed. The subsequent conviction by the petit jury therefore cannot stand.

The judgment of the lower court will be reversed and the case will be returned to the district court for proceedings not inconsistent with this opinion.

To the Clerk

Please File the Foregoing Opinion.

Max Rosenn
Circuit Judge

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1650

JOHN WILLIAM SMITH,

Appellant,

vs.

HOWARD YEAGER, Warden, New Jersey State Prison, GEORGE F. KUGLER, JR., Attorney General and Chief Prosecutor of the State of New Jersey; HONORABLE JAMES R. GIULIANO, Assignment Judge for the Superior Court for the County of Essex, State of New Jersey.

(D. C. Civil Action No. 1733-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ..... DISTRICT OF NEW JERSEY

Present:

KALODNER, HASTIE and ROSENN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 30, 1971, be, and the same is hereby reversed, and the cause remanded to the said District Court for proceedings not inconsistent with the opinion of this Court. Costs taxed in favor of appellant.

ATTEST:

THOMAS P. QUINN
Clerk

July 18, 1972

APPENDIX C

Opinion and Order of the United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 1733-70

JOHN WILLIAM SMITH,

Petitioner,

v.

HOWARD YEAGER, Warden, New Jersey State Prison; GEORGE F. KUGLER, JR., Attorney General and Chief Prosecutor of the State of New Jersey; HONORABLE JAMES R. GIULIANO, Assignment Judge for the Superior Court of New Jersey for the County of Essex,

Respondents.

ON PETITION FOR WRIT OF HABEAS CORPUS

Appearances:

HARRIS DAVID, Esq.
Attorney for Petitioner

JOSEPH P. LORDI, Esq.,
Essex County Prosecutor
By: DAVID S. BAIME, Esq.
Assistant Prosecutor
Attorney for Respondents

Appendix C

WHIPPLE, District Judge:

John William Smith filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on December 28, 1970. Petitioner was indicted on August 17, 1967 by an Essex County Grand Jury for assault and battery on two police officers, N.J.S.A. § 2A:90-4, convicted on one indictment in Essex County Superior Court, Law Division on March 28, 1968, and sentenced to a prison term of 2-3 years. The trial court denied post-trial motions to have the indictments dismissed, *State* v. *Smith,* 102 N. J. Super. 325 (Law Div. 1968), and the Supreme Court of New Jersey affirmed his conviction," 55 N. J. 476, cert. denied, 400 U. S. 949 (1970).

In this court, petitioner contends that the State obtained his conviction in violation of the Fourteenth Amendment for the following reasons: (1) the methods employed by the Essex County Jury Commissioners to select the panels from which were drawn the grand jury that indicted petitioner and the petit jury that convicted him discriminated against and resulted in an underrepresentation of blacks, women, residents of Newark, residents of Newark's Central Ward, and persons of lower economic status; (2) the State, by way of its peremptory challenges excluded all members of petitioner's race (Negro) from the petit jury; (3) publicly adverse to petitioner prejudiced him before the grand jury and led to his indictment; and (4) the oath administered to the grand and petit jurors involved in petitioner's case was vague and overbroad. The court, having had the benefit of oral argument, copious briefs, and the state court record, is now prepared to render its decision.

Appendix C

I. The Petit Jury

Petitioner raised the jury selection issue early in the proceedings against him, and the trial court conducted an extensive hearing to determine the validity of his claims. See *Smith*, supra, 102 N. J. Super. at 344-57. The hearing revealed that the petit jurors for the years 1966 and 1967 were chosen in the following manner: Clerks from the jury commissioners' office took names of a given alphabetical range from the voter registration lists located in the office of the Superintendent of Elections.[1] These names were checked against the appropriate city directory to discover those persons who had occupational exemptions.[2] All non-exempt persons were sent questionnaires

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[1] The Supreme Court of New Jersey appoints two residents of each county to act as jury commissioners. N.J.S.A. § 2A:68-1. The process by which the commissioners compile the names for both the petit and grand jury master lists is not prescribed by statute but is apparently left to the discretion of the commissioners. See N.J.S.A. § 2A:70-1.

When using the voting registration lists to select prospective jurors, the clerks working under the commissioners would mail questionnaires to all non-exempt persons, see note 2, infra, whose last names fell within a certain alphabetical range. The only exception to this practice occurred while one family produced a large number of registered voters. For example, the clerks would mail only two questionnaires to members of the same family if that family had six registered voters.

[2] Those exempt from jury service are policemen, firemen, fish and game wardens, physicians and dentists, members of the military, school teachers, any person having care and custody of a minor child, certain state employees, telephone and telegraph operators, holders of an exempt fireman's certificate, state legislators, and members of first aid and rescue squads. N.J.S.A. § 2A:69-2. Petitioner does not challenge the validity of these exemptions.

upon which they indicated whether they were exempt or disqualified from jury service.[3] The clerks, after examining those questionnaires which were returned, fed the names of all qualified persons into a computer which selected at random the required amount of prospective jurors.[4]

The trial court determined that this selection process produced the following results: (1) although women comprised 53.9% of the registered voters in Essex County, only 22.7% of the questionnaires mailed were sent to women; (2) although approximately 34% of the county's registered voters were residents of Newark, only 29.5% of the questionnaires mailed were sent to Newark residents; (3) although Negroes comprised 17% of the popu-

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[3] Those persons with non-exempt status, see note 2, supra, must meet the following qualifications:

> "Every person, male or female, summoned as a * * * juror * * * shall be a citizen of this State for at least 2 years; over 21 and under 75 years of age; a resident of the county from which he shall be taken; shall not have been convicted of a crime; and shall not, at the time of his selection, be a person who through his office, position or employment is either directly or indirectly connected with the administration of justice. Such person shall be able to read, write and understand the English language and shall not have any mental or physical disability which will prevent him from properly serving as a juror."

N.J.S.A. § 2A:69-1. Petitioner does not challenge the validity of these qualifications.

[4] The clerk excused from service certain persons because of "extreme financial hardship."

lation of Essex County, Negroes contributed only 8.36% of the names to the petit jury master lists.[5]

Because these disparities were produced by the use of the voter registration lists, petitioner argues that some other method of selection should have been employed to insure that he received a petit jury panel representing a cross section of the community. It is not the function of a federal court, however, to impose upon the State its own formula for the appropriate method of jury selection. In *Brown* v. *Allen*, 344 U. S. 443, 474 (1953), the Supreme Court, upholding the use of property and poll tax lists as a constitutional source of veniremen, stated: "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty." There is nothing in the record to indicate that the voter registration lists employed by the Essex County Jury Commissioners did not "reasonably reflect" a cross section

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[5] See *State* v. *Smith*, 102 N. J. Super. 325, 353-56 (Law Div. 1968). Petitioner now contends that Negroes comprised 25% of the county's population rather than the 17% found by the trial court. In any event, the percentage of blacks on the *voter registration list* is unknown, since voters are not categorized by race, and thus the disparity, if any, between the percentage of blacks on the voter lists and the percentage of questionnaires sent to blacks remains unknown. The figure of 8.36 as the percentage of black persons whose names were placed on the petit jury master lists was obtained by personally interviewing a sample selection of persons whose names appeared on the lists. See *Smith*, supra, 102 N. J. Super. at 356.

of the county's population.[6] See also *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320, 331-37 (1970).

Petitioner also argues that the failure of the commissioners' clerks to send out questionnaires on a basis proportionate to the voter registration list constituted a purposeful act of discrimination against those groups which were underrepresented in the mailing.[7] Petitioner,

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[6] Voter registration lists appear to be well suited to the production of jury panels representative of a cross section of the community. See, e.g., *Simmons* v. *United States*, 406 F. 2d 456 (5th Cir.), cert. denied, 395 U. S. 982 (1969); *United States* v. *Greenberg*, 200 F. Supp. 382 (S. D. N. Y. 1961). The recent congressional revision of the federal jury selection procedure is cited by respondent as evidence of the propriety of using voter lists to obtain a cross section of the community. See 28 U. S. C. §§ 1861, 1863(b)(2). But section 1863(b)(2) also requires the use of other sources if voter lists do not produce a cross section of the community. Statistics taken from the trial court's findings disclose that women were not underrepresented on the Essex County voter registration lists. Newark residents were underrepresented by 2% but still constituted 34% of lists. Negroes were probably underrepresented but the percentage of that underrepresentation is unavailable. See note 5, supra. Even assuming Negroes were underrepresented by as much as 10%, the lists still reflected a constitutional representation of the community. Cf. *Swain* v. *Alabama*, 380 U. S. 202 (1965); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Simpson*, supra.

[7] If the jury commissioners had, in fact, abandoned their random selection process and had intentionally mailed 17% of the questionnaires to Negroes, they may have been engaging in unconstitutional conduct. See *Cassell* v. *Texas*, 339 U. S. 282, 287 (1950). But cf. *Brooks* v. *Beto*, 366 F. 2d 1 (5th Cir. 1966), where court upheld the intentional inclusion of two Negroes on a grand jury panel in order to remedy a deliberate practice of total exclusion of Negroes from the grand jury.

of course, was not entitled to a jury or jury panel which proportionately reflected the racial, religious, geographical, or economic composition of the county. *Swain* v. *Alabama*, 380 U. S. 202 (1965); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Akins* v. *Texas*, 325 U. S. 398 (1945). Petitioner, however, was entitled to have the petit jury panel selected free from any unauthorized interference with or discriminatory application of the established selection procedure. *See, e.g., Carter* v. *Jury Commission of Greene County*, supra; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (1946); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *United States* v. *Zirpolo*, Nos. 18,137-18,142 (3d Cir. Feb. 18, 1971); *Rabinowitz* v. *United States*, 356 F. 2d 34 (5th Cir. 1966); *Labat* v. *Bennett*, 365 F. 2d 698 (5th Cir. 1966). Petitioner, who has the burden of proving a prima facie case of purposeful discrimination,[6] maintains that the variances between the percentages of blacks, women, and residents of Newark who received questionnaires and the respective percentages of those groups registered to vote establishes a case of discrimination. But, since proportional representation is not required by the Constitution, underrepresentation alone cannot prove discrimination. *Swain* v. *Alabama*, supra. The trial court hearing disclosed no act, whether intentional or negligent, on the part of those responsible for the mailing of the questionnaires that departed from procedures described above. In the past, those successfully challenging jury selection methods have, in addition to proving an underrepresentation of some identifiable group, been able to demonstrate either (1) a deliberate

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[6] *White* v. *Georgia*, 385 U. S. 545, 550 (1967), citing *Terrance* v. *Florida*, 188 U. S. 519 (1903).

practice of total exclusion,[9] (2) a deliberate practice of token inclusion,[10] or (3) deliberate interference with an-

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[9] See, e.g., *Coleman* v. *Alabama*, 389 U. S. 22 (1967); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Ballard* v. *United States*, 329 U. S. 187 (1946); *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (1946); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Strauder* v. *West Virginia*, 100 U. S. 303 (1879).

The Fifth Circuit, however, has adopted a policy of finding a prima facie case of discrimination against blacks based upon a large disparity between percentage of Negroes on the jury lists and the percentage of Negroes in the community. See, e.g., *Ford* v. *White*, 430 F. 2d 951 (5th Cir. 1970). The adoption of this rule follows a long history of the deliberate exclusion of blacks from juries in certain jurisdictions within the Fifth Circuit. See the Supreme Court and Fifth Circuit cases cited in both the text and notes of this opinion arising out of Texas, Louisiana, Alabama, Mississippi and Georgia.

[10] See, e.g., *Jones* v. *Georgia*, 389 U. S. 24 (1967); *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Smith* v. *Texas*, 311 U. S. 128 (1940). See also *Ford* v. *White*, 430 F. 2d 951, 955 (5th Cir. 1970).

Petitioner argues that his case is analogous to *Whitus*, supra. Based on petitioner's statistics, (Negroes comprising 25% of the county) the percentage of underrepresentation of blacks in both cases is approximately the same. In *Whitus*, the Court of Appeals had "condemned" a system whereby the names of prospective jurors were listed by race on the digests used by the jury commissioners, resulting in the total exclusion of blacks from jury service. But when it undertook to revise the jury list, "the State employed the same procedure which * * * resulted in discrimination in the petitioners' first trial." 385 U. S. at 551. Token inclusion had replaced total exclusion.

(Footnote continued on following page)

otherwise valid procedure.[11] Having failed to prove any of the above here, petitioner has fallen short of establishing a prima facie case of discrimination and, hence, a violation of his constitutional rights.

(Footnote continued from preceding page)

Here, there was no opportunity for the Essex County commissioners and clerks to discriminate against blacks since neither the voter lists or the questionnaires employed contained information as to the race of the prospective jurors. Under these circumstances, intentional discrimination cannot be presumed to have occurred.

[11] See, e.g., *Turner* v. *Fouche*, 396 U. S. 346 (1970); *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320 (1970); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Zirpolo* v. *United States*, Nos. 18,137-18,142 (3d Cir. Feb. 18, 1971); *Rabinowitz* v. *United States*, 366 F. 2d 34 (5th Cir. 1966); *Labat* v. *Bennett*, 365 F. 2d 698 (5th Cir. 1966).

Petitioner relies upon *Zirpolo*, supra, for his claim that women were unconstitutionally excluded from the jury panels. There, the federal district court clerk when selecting a jury panel of 350 persons intentially limited the number of women to 30% although women comprised 52.5% of New Jersey's population. The court held that the practice of intentional limitation was unauthorized by the federal jury selection statute, 28 U. S. C. § 1861, et seq., and had the effect of undermining "the ultimate objective of achieving a true cross-section of the community * * *." *Zirpolo*, supra, at 8. *Zirpolo* is, of course, distinguishable from petitioner's case since it involved the construction of federal law rather than the Constitution. But the court finds the analogy of *Zirpolo* unsatisfactory for other reasons. Here, there is no indication that the jury commissioners or their clerks placed limitations on service in addition to those prescribed by state law, see note 3, supra, or that they intentionally excluded anyone qualified to serve. These were the factors crucial to the finding in *Zirpolo* that the cross section ideal had not been achieved. See *Zirpolo*, supra, at 12-13 citing *United States* v. *Hoffa*, 196 F. Supp. 25, 31 (S. D. Fla. 1961).

Appendix C

II. The Grand Jury

Names for the four grand jury master lists compiled between May of 1966 and May of 1967 were obtained in the following manner: Essex County's two jury commissioners solicited names from various sources, including civic groups, churches, labor organizations, telephone directories, Negro judges, the NAACP, and the Urban League.[12] These names were submitted to the clerks who mailed out questionnaires identical to those sent to the prospective petit jurors. When the number of qualified prospective grand jurors proved to be insufficient, the clerks supplemented the grand jury master lists with names from the voter registration lists.[13]

As found by the trial court, this selection procedure produced master lists of the following composition: Negro 6%, Women 25%, residents of Newark 26.7%, while a breakdown of the Essex County population between the ages of 21 and 74 revealed that 17% were Negro, 52.2% were women, and 41.7% were Newark residents. An occupational breakdown was also made, disclosing an overrep-

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[12] The trial court hearing discloses that in 1962 the Assignment Judge of Essex County directed the jury commissioners to include more names of Negroes and "laborers" on the grand jury lists. The commissioners made special effort to do so in 1963 and 1964 and solicited the names of 250 blacks. There was apparently, however, great difficulty obtaining blacks and laborers for grand jury service because of the harsh economic consequences such service usually entails.

[13] The supplemental names were taken from registered voters who were residents of Newark.

resentation of "professionals" and an underrepresentation of "laborers" on the master lists.[14]

The respondents argue that the type of procedure employed to select the names for the master lists—a method generally known as the key man system—has never been declared unconstitutional. See *Swain* v. *Alabama,* supra, at 205-09. Petitioner maintains that, although the key man system may be constitutional per se, the jury commissioners had an affirmative duty to familiarize themselves with the composition of the Essex County population to insure that the grand jury consisted of persons from a cross section of the community.[15]

In *Smith* v. *Texas,* 311 U. S. 128 (1940), the Supreme Court held that where a minimum of three to six thousand Negroes qualified for grand jury service, the jury commissioners were forbidden by the Constitution from limiting service to their personal acquaintances when they knew no Negroes. In *Hill* v. *Texas,* supra, the court was presented with facts indicating that no Negro had served on a grand jury for 16-20 years. The jury commissioners admitted that they were personally acquainted with Negroes but were not aware of how many, if any, were qualified for service. The court reversed petitioner's conviction and held:

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[14] See *State* v. *Smith,* 102 N. J. Super. 325, 351 (Law Div. 1968).

[15] A recent case, however, has upheld the constitutionality of a volunteer grand jury system despite the marked underrepresentation of blacks, Puerto Ricans and blue collar workers. See *United States ex rel. Chestnut* v. *New York,* No. 35650 (2d Cir. May 5, 1971).

> "They [the jury commissioners] made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty * * * not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds. Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve."

316 U. S. at 404. See also *Cassell* v. *Texas,* supra, at 289-90.

In the present case, the Essex County Jury Commissioners were aware of the need to include blacks on the master lists and attempted to do so.[16] In *Swain* v. *Alabama,* supra, at 209, the court, upholding a selection process somewhat similar to the one here and one which produced similar results, stated: "Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race." This language is applicable, as well, to the case before me.

Petitioner argues that the reasoning and holding of *Swain* has been undermined by *Turner* v. *Fouche,* 396

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[16] See note 12, supra, and accompanying text.

U. S. 346 (1970), but the holding of that case does not support his contention. There, the court held that appellants had made out a prima facie case of discrimination by demonstrating a substantial underrepresentation of Negroes "*originat[ing], at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria.*" Id. at 360 (emphasis added).[17] The record here indicates that the Essex County Jury Commissioners unlike their counterparts in *Smith* v. *Texas* supra, *Hill* v. *Texas*, supra, and *Cassell* v. *Texas*, supra, did not make their selections based upon personal acquaintance with or personal investigation of the prospective grand jurors. Apparently, the jury commisioners did not know the race, occupation, intelligence, or statutory qualifications of the persons whose names they obtained. Rather, the determination of qualifications was left to the mailing of the questionnaires. Thus, it is unlikely that the commissioners had the opportunity to inject their subjective judgments into the selection process. The court, therefore, holds that petitioner has failed to make out a prima facie case of discrimination in the selection of the grand jury.

III. The Peremptory Challenges

Petitioner alleges as constitutional error the State's use of its peremptory challenges to strike all members

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[17] Turner involved a 23% underrepresentation of Negroes on the grand jury list *after* a federal district court found a systematic exclusion of blacks from the lists and ordered new lists to be completed from the voting lists. The commissioners had disqualified 178 persons for lack of "intelligence" and "uprightness" out of which 171 were black. In addition, 225 names taken from the voting lists were arbitrarily eliminated because of "lack of information."

of his race (Negro) from the jury during the voir dire.[18] The striking of Negroes in a particular case, however, is not a violation of the Fourteenth Amendment. *Swain* v. *Alabama,* supra, at 221. Petitioner has made no showing that Negroes have been systematically struck from Essex County juries.[19] Thus his request for habeas corpus relief on this ground must be denied.

IV. Pretrial Publicity[20]

Petitioner maintains that widespread publicity at the time of his arrest denied him an indictment by an impartial grand jury. The Supreme Court of New Jersey held: "The grand jury [that indicted petitioner] would have no reason for not returning indictments in view of the testimony of the police officers and there is nothing whatever before us to suggest that the indictments were returned on any improper bases or in any improper manner." *State* v. *Smith,* supra, 55 N. J. at 482. Nothing presented to this court indicates that it should not adopt the findings of the state court concerning this issue.

V. The Oath[21]

Finally, petitioner argues that he was deprived of an indictment and a trial with due process of law because an

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[18] Apparently, three Negroes were struck peremptorily.

[19] See *Swain* v. *Alabama,* 380 U. S. 202, 222-24 (1965).

[20] For this argument petitioner relies on his state court brief.

[21] For this argument petitioner relies upon his state court brief.

oath administered to his grand and petit jurors was violative of the First Amendment for vagueness and overbreadth.[22] Petitioner cannot, however, point to any actual prejudice against him that occurred because this oath was so administered. Instead, he contends that the probability of prejudice was so great that an actual finding of prejudice is unnecessary.[23] This court does not agree. It is, indeed, difficult to comprehend how the taking of the oath could have caused the jurors to act out of any motivation other than their legal duty so as to create even a probability of prejudice.

In addition, petitioner maintains that, assuming the oath to be unconstitutional, he is the proper party to vindicate the First Amendment rights of those obligated to take it. In support of this argument he cites *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), but reliance upon *Dombrowski* is misplaced. There, the Court held that one threatened with prosecution under a statute which made

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[22] The oath, in pertinent part, states:

> "* * * that you will support the Constitution of the United States and the Constitution of this State; that you do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that you are not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates, or advises the use of such means * * *."

N.J.S.A. §§ 2A:69-1.1, 2A:73-3. Petitioner does not claim that any prospective juror refused to take the oath. See generally, *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967).

[23] See *Estes* v. *Texas*, 381 U. S. 532, 542-43 (1965).

criminal conduct protected by the First Amendment had standing to challenge the statute irrespective of whether his conduct could have been constitutionally proscribed, since the need to prevent the "chilling effect" upon the First Amendment rights of others outweighed the purposes of the traditional standing rules. Id. at 485-87. Here, however, it is again difficult to attribute to the oath the propensity for evil feared by petitioner.[24] Moreover, any prospective juror desirous of serving, but unwilling to take the oath, would have standing to challenge the oath. See *Carter* v. *Jury Commission of Greene County,* supra, at 329-30.[25]

Therefore, it is on this 30th day of June, 1971 ORDERED that the petition of John William Smith for the issuance of a writ of habeas corpus be and the same is hereby denied. There is no probable cause for appeal.

LAWRENCE A. WHIPPLE,
U.S.D.J.

TO THE CLERK OF THE COURT:

Please file as court exhibits the following:

1. A transcribed copy of the pretrial hearing of *State of New Jersey* v. *John William Smith,* dated October 9, 16, 18, 19, November 20, 21, 22, December 6, 7, 1967; January 8, 10, 15, 18, February 5, 1968, in four volumes.

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[24] The threat of criminal sanctions would seem to provide a far greater inhibition to the exercise of free speech than the threatened inability to serve as a juror.

[25] Thus, the situation is not one where the rights of some can only be preserved by enabling others to raise them. See *Barrows* v. *Jackson,* 346 U. S. 249 (1953).

Appendix C

2. A transcribed copy of the voir dire in *State of New Jersey* v. *John W. Smith,* dated March 25-28, 1968, in four volumes.

3. A copy of a brief of the petitioner submitted with an appendix to the Superior Court, Docket No. A 1280-67.

4. A copy of a reply brief of the petitioner submitted to the Supreme Court of New Jersey, Docket No.. A-42.

5. A copy of a brief of the petitioner submitted to the Supreme Court of the United States for a Writ of Certiorari, Docket No. 269.

6. A copy of a brief of the respondent submitted to the Superior Court, Docket No. A 1280-67.

7. A copy of a brief of the respondent submitted to the Supreme Court of the United States in opposition to a Writ of Certiorari, Docket No. 269.

LAWRENCE A. WHIPPLE
United States District Judge

APPENDIX D

Relevant Statutes

2A:67A-3. Subpoenas

Any such officer, board, commission, committee or body authorized by law to exercise the power of subpoena may by its subpoena compel the attendance and testimony of witnesses and the production of books, papers, documents or tangible things related to any matter or subject within his or its powers of inquiry. If a person under such subpoena shall refuse or fail to appear or refuse to be examined, or to answer any proper question, or to produce any books, papers, documents or tangible things, in accordance with the subpoena, the authority issuing the subpoena may apply to the Superior Court for an order to compel him to do so. If the person under subpoena shall engage in contemptuous conduct at any such hearing, investigation or inquiry, the said authority may apply to the court to compel him to refrain therefrom. L.1953, c. 38, p. 751, § 3.

Library references

Counties (Key 47).

Municipal Corporations (Key 60).

C.J.S. Counties § 81.

C.J.S. Municipal Corporations § 153.

1. Construction and application

Architect employed by board of education of city of Union City must testify and produce records in his possession pursuant to subpoena served on him

by investigating committee of board of commissioners of city in connection with inquiry into conduct of board of education. Board of Ed. of Union City, Hudson County v. Union City, Hudson County, 112 N.J.Super. 493, 271 A.2d 733 (1970).

Trustees of free public library were properly subpoenaed to testify before municipal investigating committee created by board of commissioners of city pursuant to this section and to produce records in their possession pertaining to library and conduct and management of its activities. Board of Trustees of Free Public Library of Union City, Hudson County v. Union City, Hudson County, 112 N.J.Super. 484, 271 A.2d 728 (1970), affirmed 116 N.J.Super. 186, 281 A.2d 397.

Chairman of board of adjustment has power to issue subpoenas for attendance of witnesses and production of records and may administer oaths at hearings on application for zoning variance. Tomko v. Vissers, 21 N.J. 236, 121 A.2d 502.

2A:67A-4. Short title

This act[1] shall be known as the "County and Municipal Investigations Law." L.1953, c. 38, p. 751, § 4.

Subtitle 8. Juries

Chapter 68. Jury Commissioners

Sec.

2A:68-1.1 Termination of office of persons now holding office [New].

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[1] Sections 2A:67A-1 to 2A:67A-4.

Appendix D

2A:68-1.2 Effective date [New].

2A:68-1. Qualifications; appointment

In each county of the State there shall be appointed by the Supreme Court, two citizens, resident therein who shall not be members of the same political party, who shall constitute and be designated the jury commissioners of the county. No person holding any other public office other than that of sheriff, and no person licensed to practice law in this State shall be appointed as a jury commissioner. The certificate of appointment of each person appointed as a jury commissioner with his oath of office, shall be filed in the office of the county clerk of the county. As amended L.1953, c. 240, p. 1723, § 1.

Approved July 20, 1953. Effective date, see § 2A:68-1.2.

Section 5 of the act of 1953 repealed all inconsistent acts and parts of acts.

Supplementary Index to Notes

Power in general 1.5

Library references

Jury (Key 30(1)).

C.J.S. Juries § 156.

1.5 Power in general

There is presumption that jury commissioners acted within scope and authority of their office. State v. Forer, 104 N.J.Super. 481, 250 A.2d 431 (1969).

Appendix D

Jury commissioners must have power to choose qualified jurors even though some loss results in cross-section character of jury composition. Id.

5. Sheriff's power

Notwithstanding constitutional provision for election of sheriffs, any attempt, by sheriff to interfere with court's functions in supervision, processing, selection or assignment of petit jurors or petit jury panels was inimical to sound administration of justice in county and in direct violation of applicable rules, statutes and decisional law of state to effect that legislature may alter duties of sheriffs. In re Supervision and Assignment of Petit Jury Panels in Essex County, 114 N.J.Super. 527, 277 A.2d 417 (1971).

2A:68-1.1 Termination of office of persons now holding office

The designations and terms of office of all commissioners of juries or jury commissioners now holding office shall terminate on June thirtieth, one thousand nine hundred and fifty-three. L.1953, c. 240, p. 1724, § 4.

2A:68-1.2 Effective date

This act[1] shall take effect June thirtieth, one thousand nine hundred and fifty-three, but any appointment authorized by this act may be made after the approval hereof by the Governor. L.1953, c. 240, p. 1724, § 6.

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[1] Sections 2A:68-1, 2A:68-1.1, 2A:68-1.2, 2A:68-4, 2A:68-6.

Appendix D

2A:68-4. Removal of commissioners

The Supreme Court may remove a jury commissioner at any time. A certificate of removal shall be filed in the office of the clerk of the county for which the removed commissioner was appointed. As amended L.1953, c. 240, p. 1723, § 2.

Effective date see § 2A:68-1.2.

Library references

Jury (Key 59(1)).

C.J.S. Juries § 156.

2A:68-6. Filling vacancies In office of commissioner

If the office of a jury commissioner becomes vacant by reason of his removal pursuant to section 2A:68-4 of this Title, or his death, resignation or removal from the county, or his disqualification by assuming the duties of another public office, or for any other reason, the Supreme Court shall appoint his successor for the balance of the term. A certificate of the appointment to fill a vacancy shall be filed in the office of the clerk of the county in which the vacancy existed. As amended L.1953, c. 240, p. 1723, § 3.

Effective date, see § 2A:68-6.

Library references

Jury (Key 59(1)).

C.J.S. Juries § 156.

Appendix D

Chapter 69. Jurors; Qualifications; Exemptions; Ineligibility

See.

2A:69-1.1 Oath of petit jurors [New].

2A:69-5. Employee of state, county or municipality or mass transportation facility; excuse from employment for jury duty; compensation [New].

2A:69-6. Mass transportation facility defined [New].

Law Review Commentaries

Factors militating against continuance of jury system. Joseph T. Karcher (Spring 1971) 14 N.J. State Bar J. 25.

Impartial juries—Alleviation of the requirement of showing prejudice as a demonstrable reality. (1964) 18 Rutgers L.Rev. 686.

Juror selection: A discriminating art. (1970) 1 Seton Hall L.Rev. 76.

Refusal to serve on jury because of religious beliefs not constitutionally guaranteed. (1963) 18 Rutgers L.Rev. 204.

The importance of the voir dire. J. T. Karcher (Summer 1968) 11 N.J.State Bar J. 139.

2A:69-1. Qualifications of Jurors

Every person, male and female, summoned as a grand juror, and every petit juror returned for the trial of any action of a civil or criminal nature in any of the courts of this State, shall be a citizen of this State for at least

2 years; over 21 and under 75 years of age; a resident of the county from which he shall be taken; shall not have been convicted of a crime; and shall not, at the time of his selection, be a person who through his office, position or employment is either directly or indirectly connected with the administration of justice. Such person shall be able to read, write and understand the English language and shall not have any mental or physical disability which will prevent him from properly serving as a juror. As amended L.1953, c. 9, p. 1026, § 1; L.1964, c. 44, § 1.

SUPPLEMENTARY INDEX TO NOTES

Prior service as juror 6.5

Library references

Jury (Key 38).

C.J.S. Juries § 134 et seq.

1. Validity

All jury discrimination cases present question of fact. State v. Smith, 102 N.J.Super. 325, 246 A.2d 35 (1968) affirmed 55 N.J. 476, 262 A.2d 868.

There is no constitutional requirement for an affirmative statutory standard for the selection of jurors, but constitutional right to jury trial means an impartial jury drawn from cross-section of county, and courts will strike down practices which are designed to subvert this principle, but courts will

not merely substitute their own formula for that chosen in good faith by jury commissioners. State v. Sturdivant, 31 N.J. 165, 155 A.2d 771, certiorari denied 80 S.Ct. 873, 362 U.S. 956, 4 L.Ed. 873.

2. Construction and application

Summary conviction for contempt does not amount to "conviction" within statutes imposing disability or disqualification or otherwise discrediting one because of conviction for crime. In re Buehrer, 50 N.J. 501, 236 A.2d 592 (1967).

3. Competency of jurors in general

Grand jury should be composed of persons who have intelligence not simply to indict in cases for which petit jurors may also convict, but intelligence and integrity to make independent investigations for purpose of presentments and to make recommendations for governmental action. State v. Rochester, 105 N.J.Super. 529, 253 A.2d 558 (1969).

Commissioners in selecting grand jury list can use standards above bare qualifications of statute, and may use higher education standard. Id.

One who has been convicted of a crime is not qualified to serve as a grand juror. In re Jeck, 26 N.J.Super. 514, 98 A.2d 319.

6.5 Prior service as juror

The mere circumstance that a juror has served and participated previously in determination of a case between different parties involving the making

or existence of some distinctly independent oral contract of employment does not of itself positively disqualify him from jury service in subsequent action relating to comparable issues in the same category. Hoblin v. Wyckoff General Supply Co., 42 N.J.Super. 364, 126 A.2d 365.

Where two jurors, who had previously participated in determination of a case between different parties involving making or existence of an oral contract of employment, were allowed to act as jurors in subsequent action relating to comparable issues in same category, but such jurors had avowed under oath their intention to act impartially and to discharge their duty to find a verdict based only on evidence in case, and where defendant's counsel had absolute knowledge of jurors who had constituted jury in former case, denial of mistrial on ground such jurors were prejudiced was not error. Id.

7. Race or color

Evidence did not establish intentional, systematic, purposeful, exclusion of

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Validity 1

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1. Validity

This section and § 2A:73-3 requiring loyalty oath of grand and petit jurors are not unreasonable re-

strictions of First Amendment freedoms. State v. Smith, 102 N.J.Super. 325, 246 A.2d 35 (1968) affirmed 55 N.J. 476, 262 A.2d 868.

2. Construction and application

Regardless of constitutionality of statutory oaths required of grand and petit jurors, where defendant was not member of any group which might be excluded because of oaths and there was no suggestion that any prospective grand or petit juror had actually declined to take oaths or had been excluded because of them, probability of prejudice was so remote as to be viewed as nonexistent and was not basis for reversal of conviction. State v. Smith, 55 N.J. 476, 262 A.2d 868 (1970), certiorari denied 91 S.Ct. 232, 400 U.S. 949, 27 L.Ed.2d 256.

2A:69-2. Exemptions from jury service

The following persons shall be exempt from service on any panel of grand or petit jurors:

a. Members or employees of police forces, State or local.

b. Members of any fire department or fire patrol, volunteer or paid.

c. Persons appointed as fish and game wardens or protectors.

d. Regularly licensed and practicing physicians and dentists in this State.

e. Members of State or Federal military, naval or air forces (*on active duty*).

Changes or additions in text are indicated by italics.

f. School teachers (*under contract as full time teachers*) while their schools are in session.

g. Any person who has the actual physical care and custody of a minor child and who gives written notice to the jury commissioners of the county of his residence that jury service would interfere with the care required for such child.

h. All officers and persons regularly employed by any agency under the authority of the State Board of Control of the Department of Institutions and Agencies, or regularly employed by hospitals.

i. Telegraph and telephone operators and linemen and those directly engaged in the business of receiving and transmitting messages by telegraph or calls by telephone.

j. Any person who is the holder of an exempt firemen's certificate issued pursuant to sections 40:47-52 to 40:47-59 of the Revised Statutes or any other law.

k. Members of the State Legislature.

l. Members of first aid and rescue squads.

Amended by L.1953, c. 140, p. 1346, § 1, eff. May 7, 1953; L.1968, c. 56, § 1, eff. June 21, 1968; L.1969, c. 281, § 1, eff. Jan. 14, 1970; L.1970, c. 267, § 1, eff. Nov. 4, 1970.

Library references

Jury (Key 55).

C.J.S. Juries § 153.

Changes or additions in text are indicated by italics.

Appendix D

2A:69-5. EMPLOYEE OF STATE, COUNTY OR MUNICIPALITY OR MASS TRANSPORTATION FACILITY; EXCUSE FROM EMPLOYMENT FOR JURY DUTY; COMPENSATION

Any person employed by the State, county or municipality or by any mass transportation facility who is summoned for service as a grand juror or petit juror in any court of this State or in the United States District Court for New Jersey shall be excused from his employment on all days he is required to be present in court in response to the summons for jury service. Any full-time employee shall be entitled to receive from his employer his usual compensation for each day he is excused for jury service, or at least his actual compensation, less the amount of per diem fee for each day of such jury service as shown on a statement issued to the juror by the sheriff or other court officer making payment of juror fees.

L.1971, c. 403, §1.

Section 4 of L. 1971, c. 403, approved Jan. 11, 1972, provided: "This act shall take effect 45 days after enactment."

Title of Act:

An Act concerning jurors, requiring leaves of absence from certain types

2A:90-3 CIVIL AND CRIMINAL JUSTICE

5. Nature and elements of offense

Intent to rob is not essential element of assault with offensive weapon. State v. Jackson, 90 N. J. Super. 306, 217 A.2d 328 (1966).

This section defines two separate offenses:

(1) assault with an offensive weapon; and (2) where a person by "menaces, force or violence" de-

mands money or goods with intent to rob; such intent is an essential element of the second offense but not of the first. Id.

2A:90-4. ASSAULT AND BATTERY UPON LAW ENFORCEMENT OFFICER IN PERFORMANCE OF DUTIES

Any person who commits an assault and battery upon:

a. Any State, county or municipal police officer, or any public school law enforcement officer, or any other law enforcement officer, acting in the performance of his duties while in uniform or exhibiting evidence of his authority; *or*

b. Any paid or volunteer fireman acting in the performance of his duties while in uniform, or while riding in or upon a fire engine, hook and ladder truck or other fire-fighting apparatus or equipment, or while actively engaged in abating or quelling a fire, or while otherwise clearly identifiable as being engaged in the performance of the duties of a fireman; or

c. Any member of an ambulance, rescue, first-aid, or emergency squad or corps; or any physician, nurse, medical assistant, or employee of a hospital, clinic, or ambulance service; acting in the performance of his duties while in uniform; or while wearing an armband or other clearly visible identification indicating his status as a person engaged in emergency, first-aid, or medical services; or while riding in or upon, or entering or leaving, any clearly identifiable ambulance or other emergency vehicle—

Changes or additions in text are indicated by italics.

Appendix D

Is guilty of a high misdemeanor.

L.1962, c. 39, § 1. Amended by L.1967, c. 183, § 1, eff. July 27, 1967; L.1967, c. 262, § 1, eff. Jan. 8, 1968.

Title of Act:

An Act concerning crimes and supplementing chapter 90 of Title 2A of the New Jersey Statutes. L.1962, c. 39.

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Assault and Battery (Key 48).

C.J.S. Assault and Battery § 57 et seq.

½. Validity

Appendix D

Phrase "other law enforcement officer" as used in this section proscribing assault and battery upon law enforcement officer is not so vague and ambiguous as to render statute unconstitutional. State v. Grant, 102 N. J. Super. 164, 245 A. 2d 528 (1968).

1. Construction and application

County penitentiary correction officer, whose duties were generally to supervise prisoners and maintain order in penitentiary, and who wore official uniform and badge while performing his duties, was "law enforcement officer" within this section proscribing assault and battery upon law enforcement officer. State v. Grant, 102 N. J. Super. 164, 245 A. 2d 523 (1968).

Legislature intended to encompass within scope of this section proscribing assault and battery upon law enforcement officer those persons whose duty it is to supervise administration of criminal punishment and to maintain security within and without confines of State's penal institutions. Id.

Term "law enforcement officer" as used in this section proscribing assault and battery upon law enforcement officer is not limited to persons empowered by law to investigate, arrest and prosecute violators of the law. Id.

Offense of threatening a police officer's life is not merged with or preempted by statute condemning an assault and battery upon an officer, but elements of the two offenses are separate and distinct. State v. Montague, N. J. Super. 483, 244 A. 2d 699 (1968).

Appendix D

A person can be prosecuted for high misdemeanor offense of assault and battery upon law enforcement officer if all the conditions prescribed by this section are met; otherwise the offense, if any, would be a simple assault and battery under the Disorderly Persons Act. State v. States, 44 N. J. 285, 208 A. 2d 633 (1965).

If attack on police officer is inconsequential, prosecuting attorney can charge simple assault and battery under the Disorderly Persons Act rather

APPENDIX E

Opinion of the Supreme Court of New Jersey (55 N. J. 476)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN WILLIAM SMITH,

Defendant-Appellant.

Argued December 15 and 16, 1969.

Decided March 16, 1970.

SYNOPSIS

Prosecutions for assault and battery. Defendant's motion to dismiss indictments was denied by the Superior Court, Law Division, 102 N. J. Super. 325. From judgment of conviction, defendant appealed. The Supreme Court held that, even though disorders and lawlessness in city in summer of 1967 were said by some to have been triggered by defendant's arrest and there was extensive publicity at that time, where defendant's trial did not begin until March 1968 and court and counsel took great

pains to make certain that those selected as jurors had little or no recollection of any pertinent earlier publicity, defendant was not prejudiced on basis that widespread and adverse publicity surrounding proceedings denied to him a fair trial.

Affirmed.

1. Jury (Key 33(1))

Substantial underrepresentation of Negroes, women, persons of low incomes and residents of Newark on grand or petit jury lists in Essex County did not violate defendant's constitutional rights and render his indictment and conviction invalid.

2. Criminal law (Key 1166½(6))

Even though disorders and lawlessness in city in summer of 1967 were said by some to have been triggered by defendant's arrest and there was extensive publicity at that time, where defendant's trial did not begin until March 1968 and court and counsel took great pains to make certain that those selected as jurors had little or no recollection of any pertinent earlier publicity, defendant was not prejudiced on basis that widespread and adverse publicity surrounding proceedings denied him a fair trial.

3. Criminal law (Key 1166½ (9))

Regardless of constitutionality of statutory oaths required of grand and petit jurors, where defendant was not member of any group which might be excluded because of oaths and there was no suggestion that any prospective grand or petit juror had actually declined to take oaths or had been excluded because of them, probability of preju-

dice was so remote as to be viewed as nonexistent and was not basis for reversal of conviction. N.J.S. 2A:69-1.1, 2A:73-3, N.J.S.A.

4. Jury (Key 133)

Whether challenges for cause should he heard at side bar out of hearing of prospective jurors was within trial court's discretion.

5. Jury (Key 140)

Negro defendant's constitutional rights were not violated by prosecutor's use of peremptory challanges to exclude three Negroes from petit jury, in absence of showing that the three prospective jurors were excused solely because of their race.

6. Criminal law (Key 867)

Where witnesses were sequestered but defense counsel did not call court's attention to desirability of directing each witness not to discuss his testimony with other prospective witnesses until they had testified and court gave no such specific direction, defense motion for mistrial made on day after learning that one witness who had testified had talked with a prospective witness was untimely and denial of motion was not an abuse of discretion, in absence of showing fault on part of state or of prejudice.

7. Criminal Law (Key 1170½(1))

Where it appeared that admission of prior statements of defense witness for purposes of neutralizing testimony of witness on trial would not have had any material effect

on jury's verdict, exclusion of prior statements did not constitute abuse of trial court's discretion or warrant reversal of conviction.

8. Criminal law (Key 371(12))

Where State asserted that, when defendant's taxicab was stopped and defendant was asked to produce his driver's license, he failed to do so and came out cursing and swinging and defendant said he immediately produced license and offered no resistance, State's evidence relating to his prior traffic offenses and revocation of driver's license was admissible to show notive for conduct alleged by State, in prosecution for assault and battery on police officers. Rules of Evidence, rule 55, N.J.S.A.

9. Criminal law (Key 1130(6))

Use of reply brief by defense to enlarge on main argument and attack an additional evidential ruling was improper.

Mr. Harris David and *Mr. Raymond Brown* argued the cause for appellant (*Mr. Oliver Lofton*, attorney; *Mr. Edward Carl Broege, Jr.*, of counsel).

Mr. M. Richard Altman, Assistant Prosecutor, argued the cause for respondent (*Mr. Joseph P. Lordi*, County Prosecutor of Essex County, attorney).

Per Curiam: The Essex County Grand Jury returned indictments which charged the defendant John William Smith with having committed assaults and batteries on police officers John De Simone and Vito M. Pontrelli. His motion to dismiss the indictments was denied (*State* v. *Smith*, 102 N. J. Super. 325, 246 A. 2d 35 (Law Div.

1968)) and, after trial, the jury failed to agree on the Pontrelli matter but found the defendant guilty of having committed an assualt and battery on Officer De Simone. The defendant appealed to the Appellate Division and we certified before argument there.

The officers testified that while they were traveling west in a police car along 15th Avenue, the defendant driving a taxicab behind them went into the eastbound lane and passed them at the intersection of 15th Avenue and South Seventh Street. They followed the cab and brought it to a stop on 15th Avenue between Ninth and Tenth Streets. When they asked the defendant for his license and registration he became abusive and was placed under arrest. Officer De Simone ordered him out of the cab but the defendant first held on to the door and then suddenly opened it, striking it against the officer's chest. The defendant jumped from the cab, cursing and swinging and then struck Officer De Simone in the mouth with his first. Officer Pontrelli came to De Simone's assistance and, after a struggle, the defendant was subdued and forced into the rear of the police car. The foregoing version of the incident was supported by the testimony of both officers. In addition Officer Citarella, who came quickly to the scene on a police radio call, testified that he saw De Simone bleeding from his lip and De Simone said that he "got wacked," he "got hit." The trial judge told the witness not to tell what he was told. But *cf. State* v. *Simmons*, 52 N. J. 538, 541-42 (1968). Dr. Kredenser testified that he treated Officer De Simone for a superficial laceration on the lower lip, applied merthiolate, put on some gentian violet and "gave him tetanus toxoid too."

The defendant denied that he struck either of the officers. He testified that when he passed the police car it was

double parked and thereafter, when he was signaled by the police car to stop, he pulled into a vacant space along the curb. He was asked for and produced his driver's license and registration and one of the officers said "you popped the intersection" which the defendant took to mean that "he was playing games." The defendant replied that the police car was double parked but the officers said that it was "in motion." At that point the defendant said "go ahead and do what you want to do" because he figured he "would get a ticket and go back to work." The officers then told him that he was under arrest and he got into the police car. The defendant denied that he cursed or struck either officer but testified that while he was in the police car being driven to the precinct headquarters and later at the headquarters he was beaten by the officers. The officers denied this and, in view of the indictments and the trial issue, the jury was called upon to determine only whether the State had established beyond reasonable doubt that the defendant, when he emerged from the cab, had assaulted the police officers, as they flatly asserted and he flatly denied. The jury credited the officers' testimony that the defendant had struck Officer De Simone and its finding of guilt is not attacked before us as being against the weight of the evidence. R.R.1:5-1 (now R. 2:10-1); *State* v. *Williams*, 39 N. J. 471, 490, *cert. denied*, 374 U. S. 855, 83 S. Ct. 1924, 10 L. Ed. 2d 1075 (1963), 382 U. S. 964, 85 S. Ct. 449, 15 L. Ed. 2d 366 (1965).

[1] In support of his appeal, the defendant's brief advances nine points of alleged error which will be dealt with in the order of their presentation. The first asserts that "[t]he substantial underrepresentation of four identi-

fiable classes of citizens, to wit, Negroes, women, persons of low incomes, and residents of Newark" on the grand and petit jury lists violated the defendant's constitutional rights and rendered his indictment and conviction invalid. This point was dealt with adequately by Judge Giuliano in the Law Division; we agree essentially with his opinion (102 N. J. Super. at 344-57) and find no sufficient showing of any constitutional infirmities in the pertinent Essex County grand and petit jury lists. *Cf. State* v. *Rochester*, 54 N. J. 85 (1969) where we affirmed Judge Botter's rejection of a somewhat comparable attack on the Bergen County jury lists and noted specifically the recent steps which have been taken towards truly random selection throughout our entire State not only of petit jurors but of grand jurors as well. 54 N. J. at 91-92.

[2] In his second point the defendant contends that the "widespread and adverse publicity that surrounded the proceedings below" denied to him a fair and impartial "grand jury hearing and trial." The disorders and lawlessness which took place in Newark in the summer of 1967 were said by some to have been triggered by the defendant's arrest. There was extensive publicity but this was largely in July 1967 and the defendant's trial did not begin until the latter part of March 1968. When the jury was being selected for the defendant's trial, court and counsel took great pains to make certain that those selected would be fair and impartial jurors, who had little or no recollection of any pertinent earlier publicity, and who would be in sound position to decide the case on the evidence and the legal instructions presented during the trial. The *voir dire* was substantially unrestricted, it consumed much time and careful examination of it sup-

ports the conclusion that a fair and impartial jury was actually obtained. *See State* v. *Ravenell,* 43 N. J. 171, 181 (1964), *cert. denied,* 379 U. S. 982, 85 S. Ct. 690, 13 L. Ed. 2d 572 (1965). We find nothing in the record to indicate that the defendant's right to a fair trial was prejudiced by the earlier publicity; nor do we find anything to indicate that the publicity prejudiced the defendant insofar as the grand jury proceedings were concerned. The grand jury would have no reason for not returning indictments in view of the testimony of the police officers and there is nothing whatever before us to suggest that the indictments were returned on any improper basis or in any improper manner. *See* 102 N. J. Super. at 339-44; *cf. State* v. *Borg,* 9 N. J. Misc. 59 (Sup. Ct. 1931).

[3] The defendant's third point attacks the constitutionality of the statutory oaths required of grand and petit jurors. N.J.S. 2A:73-3; N.J.S. 2A:69-1.1. The Law Division expressly held, *inter alia,* that the oath requirements were constitutional. 102 N. J. Super. at 335-37. Construed and applied narrowly (*cf. Application of Walter Marvin, Jr.,* 53 N. J. 147, *cert. denied,* 396 U. S. 821, 90 S. Ct. 62, 24 L. Ed. 2d 72 (1969)), they should readily withstand constitutional attack. *See* 102 N. J. Super. at 336-37; *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 49-52, 81 S. Ct. 997, 6 L. Ed. 2d 105, 116-17 (1961); *American Communications Assoc.* v. *Douds,* 339 U. S. 382, 412-13, 70 S. Ct. 674, 94 L. Ed. 925, 951-52 (1950). However, we need not pursue the issue here for we are satisfied that the defendant was not in any event, harmed by the oath requirements. He was not a member of any group which might be excluded because of the oaths (102 N. J. Super. at 333) and, more importantly, there was no suggestion that any prospective grand or petit jurors had

actually declined to take the oaths or had been excluded because of them. The circumstances make it evident that the "probability of prejudice," referred to in the defendant's brief, was entirely absent; indeed the danger of prejudice was so remote as to be viewed as nonexistent.

[4] In his fourth point, the defendant asserts that the trial court improperly refused to allow his counsel to make challenges for cause out of the hearing of prospective jurors. The first time counsel asked to make a challenge for cause at the bench he was permitted to do so and the challenge was sustained. The second time the court told him to make his challenge in open court and it was also sustained; it may be that the court, knowing its probable ruling in this particular instance, thought time would be saved that way. Later counsel made challenges for cause without requesting permission to come to the bench. When at one point counsel said that he felt compelled to exercise peremptory challenges because the court had instructed him "that challenges for cause could not be heard at side bar," the trial judge said "I did not say that." Later when counsel asked, he was again permitted to come to the bench for the purpose of making a challenge for cause. All in all it may not fairly be said that the trial court had made any general ruling prohibiting challenges for cause at side bar. The subject matter was clearly one within the trial court's discretion and there is nothing to indicate any improper exerecise of that discretion or any prejudice to the defendant.

[5] We find no merit in the defendant's fifth point which asserts that the prosecutor's use of peremptory challenges to exclude Negroes (the defendant was a Negro) from the petit jury violated his constitutional

rights. The prosecutor and defense counsel each had ten peremptory challenges to use generally as they pleased. R. 1.8-3(d). They were not called upon to express any reasons and both of them exercised their peremptory challenges freely and without any indications whatever as to their reasons. *See Swain* v. *Alabama,* 380 U. S. 202, 220, 85 S. Ct. 824, 836, 13 L. Ed. 2d 759, 772 (1965): "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." The defendant sets forth, as a fact, that only three Negroes were called on the *voir dire* and that the prosecutor exercised peremptory challenges with respect to all three. But that fact without more does not establish any practice of systematic exclusion of Negroes, nor does it establish, as the defendant contends, that the three prospective jurors were excused "solely because of their race"; indeed our examination of the *voir dire* suggests that in at least one of the three instances there was an obvious affirmative reason, wholly unrelated to race, for the prosecutor's exercise of his peremptory challenge. *See Swain* v. *Alabama, supra,* where the Court, in rejecting a constitutional attack on the prosecutor's exclusion of Negroes from a particular jury through the use of peremptories, said:

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the

court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. 380 U. S. at 222, 85 S. Ct. at 837, 13 L. Ed. 2d at 773-774.

[6] The defendant's sixth point urges that witnesses for the State had breached the trial court's sequestration order and that a mistrial should have been declared for that reason. On defense counsel's motion the trial court had directed that the witnesses be sequestered. *Cf. State* v. *Di Modica*, 40 N. J. 404, 413 (1963). Prospective witnesses were kept out of the courtroom but defense counsel did not call the court's attention to the desirability of directing each witness not to discuss his testimony with other prospective witnesses until they had testified and apparently the trial court gave no such specific direction. *See State* v. *Williams*, 29 N. J. 27, 46 (1959). After Officer De Simone testified, he met Officer Pontrelli during luncheon. When later Pontrelli was called by the State to testify, defense counsel knew that he had talked with De Simone but raised no objection before the trial court. Instead, during cross-examination, he asked Pontrelli whether he had spoken with De Simone and Pontrelli said he had but that De Simone had merely related some of the questions asked of him without relating his answers. On the following day, at the conclusion of another witness' testimony, defense counsel made a belated motion for mistrial. It was untimely and, in any event, the trial court

properly exercised its discretion in denying it. *See State* v. *Williams, supra,* where the Court noted that violation of a sequestration order "without fault on the part of the State, would not constitute error; at least it is difficult to conceive of a case in which it would." 29 N. J. at 46-47. *See also State* v. *Michalis,* 99 N. J. L. 31, 34 (Sup. Ct. 1923). Here there was no fault on the part of the State and no showing of prejudice. We are satisfied that the defendant's sixth point lacks substance and presents no ground for reversal.

[7] The defendant's seventh point attacks an evidential ruling during Deputy Chief Melchior's testimony as an abuse of the trial court's discretion. Several witnesses for the State had testified that Officer De Simone had a laceration of the lip whereas several defense witnesses said they saw no evidence of such injury. The defense called De Simone as its witness and he testified that the defendant's blow struck him in the mouth; that the blow struck his lower lip breaking the skin on the inside, and that the break in the skin was not visible from the outside although there was externally visible swelling or puffiness. After De Simone completed his testimony the defense called Melchior who testified that when he saw De Simone at precinct headquarters De Simone had a small cut and swelling on the lower lip. He further testified that the cut was on the outside and was visible to him. Defense counsel then sought to inquire about earlier testimony in a separate proceeding where Melchior allegedly said that De Simone's injury was to the upper lip rather than, as he stated on the witness stand, to the lower lip. At that point, the trial court asked defense counsel whether he was seeking to impeach his own witness and counsel replied that he had called Melchior "as a hostile witness in

this matter." When the court expressed the view that the witness was not hostile, counsel proceeded to inquire about the earlied testimony but an objection to the inquiry was sustained.

In the defendant's brief, counsel acknowledges that his stated justification for seeking to impeach Melchior's testimony was not legally sound but he now urges that he should have been permitted to proceed under New Jersey's rule relating to "neutralization." *See* Evidence Rule 20; *State* v. *Gallicchio*, 44 N. J. 540, 546 (1965); *State* v. *Bacchelor*, 52 N. J. Super. 378, 389 (App. Div. 1958). In *Gallicchio* the Court pointed out that where a party calls a witness who surprises by testifying contrary to a prior statement, to the harm of the proponent's case, the proponent may be permitted to use the prior statement for the purpose of neutralizing or cancelling out the witness' surprising testimony on the stand. Evidence Rule 20 specifies that "party calling a witness may not neutralize his testimony by a prior contradictory statement unless the judge finds he was surprised." And *Gallicchio* noted that "the proponent cannot claim harm if the present testimony is only contrary to that which the proponent expected or was attempting to elicit or that the witness failed to render the expected assistance" and that to constitute harm "the witness must give testimony asserting the existence or nonexistence of a material fact contrary to the proponent's case." 44 N. J. at 546.

It seems clear that the defendant suffered no harm within the principles set forth in *Gallicchio* or indeed in any realistic sense. Melchoir's testimony varied from that of De Simone and, in his summation to the jury, defense counsel made the most of the variation. Thus he pointed

to De Simone's testimony that his laceration was not externally visible and to Melchior's conflicting testimony, and he referred to this as "one of the basic inconsistencies" in the State's case which, he urged to the jury, did not measure up to the required standard of proof beyond a reasonable doubt. If Melchior's testimony had been neutralized, counsel could hardly have made any effective use of it in his summation. In any event, the entire matter of Melchior's testimony apears to us to be minor and nonprejudicial in the light of the full record; we are satisfied that if the prior statement had been admitted for neutralization purposes it would not have had any material effect on the jury's verdict and that its exclusion clearly did not constitute an abuse of the trial court's discretion calling for reversal of the defendant's conviction.

[8] The eighth point asserts that the trial court erred in permitting the introduction of evidence relating to prior traffic offenses. The State's evidence indicated that when the defendant's car was stopped and he was asked to produce his driver's license and automobile registration he failed to do so but came out cursing and swinging. The defendant denied this and said that he immediately produced his license and registration and offered no resistance. In attacking his version, the State, on cross-examination, brought out evidence indicating a motive and an explanation of his behavior, namely, his driver's license had been revoked and therefore it may fairly be inferred that he was concerned about an offense much more serious than the manner of his driving along 15th Avenue and one which would endanger his continued operation as a cab driver.

Appendix E

The defendant contends that the evidence of his being on the revoked list as a result of his previous "accumulation of twelve points," was inadmissible under Evidence Rule 55 which states that "evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a crime or civil wrong on another specified occasion • • •." However the same rule contains an explicit exception which states that "such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident." *See State* v. *Kociolek* 23 N. J. 400, 418-20 (1957); *State* v. *Harris*, 105 N. J. Super. 319, 322-23 (App. Div. 1969). The evidence was admissible within this exception and, in the context of the entire record, we find neither error nor prejudice in the manner in which the trial court dealt with it.

[9] The ninth and final point in the defendant's brief urges that the judgment of conviction be reversed "because of the accumulation of errors committed below" (*State* v. *Orecchio*, 16 N. J. 125, 129 (1954)); this point must of course fall in the light of our disposition of the defendant's earlier points. In a reply brief purportedly responding to the State's answering brief, the defendant enlarged on his main argument and attacked an additional evidential ruling of minor nature. Such use of a reply brief is improper, and, in any event, nothing was presented of any substantial merit or of sufficient significance to warrant discussion here. As we have already indicated, the trial was a full and fair one and was free from error prejudicially affecting the defendant's legal rights. The issue was a factual one with little complexity and the jury

decided it in favor of the State and against the defendant. We cannot say on the record before us that the jury's finding of guilt was either unjust or infirm and accordingly our clear appellate responsibility is to declare that the judgment of conviction below be and hereby is:

Affirmed.

For affirmance—Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR, HALL, SCHETTINO and HANEMAN—7.

For reversal—None.

APPENDIX F

Opinion of the Supreme Court of New Jersey, Law Division (102 N. J. Super. 325)

THE STATE OF NEW JERSEY,

Plaintiff,

v.

JOHN WILLIAM SMITH, *et al.*,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
Decided June 28, 1968.

SYNOPSIS

Prosecutions for accault and battery. The defendants moved to dismiss indictment. The Superior Court, Law Division, Giuliano, A. J. S. C., held that defendants did not have standing to challenge constitutionality of loyalty oath required of grand and petit jurors, and that oath was not unconstitutional in any case, that transcript of grand jury proceedings was not required, and that evidence established that there had been no misconduct by grand jury and that there had not been discrimination in composition and selection of grand and petit jurors.

Motions denied.

Appendix F

1. Constitutional law (Key 257)

Grand jury (Key 2)

Due process does not require State to adopt grand jury system and State may abolish grand juries without violating Fourteenth Amendment and has considerable latitude in type of grand jury system to establish. U.S. C.A. Const. Amend. 14.

2. Constitutional law (Key 42)

If defendant is not member of group excluded from grand jury, exclusion will not be held unconstitutional as to him unless he was actually prejudiced.

3. Constitutional law (Key 42)

Question of standing in state court to raise constitutional question is to be determined by state law.

4. Constitutional law (Key 42)

Defendants who were not in class of persons allegedly excluded by grand jurors' loyalty oath did not have standing to challenge constitutionality of statute requiring oath. N.J.S. 2A:69-1.1, 2A:73-3, N.J.S.A.; U.S.C.A. *Const.* Amends. 1, 5, 14.

5. Grand jury (Key 1)

Juries, in particular grand juries, are arms of court and perform *quasi*-judicial function.

6. Grand jury (Key 1)

It is specific function or grand jury to find and return indictment or presentment in open court to assignment judge.

7. Criminal law (Key 866)

Grand jury (Key 15, 33)

Jury (Key 46)

Grand jury and petit jury must accept law as written or charged, and jurors themselves must be loyal to government and laws which it promulgates.

8. Constitutional law (Key 90)

Grand jury (Key 2)

Jury (Key 148(1))

Statutes requiring loyalty oath of grand and petit jurors are not unreasonable restrictions of First Amendment freedoms. N.J.S. 2A:69-1.1, 2A:73-3, N.J.S.A.; U.S.C.A. Const. Amend. 1.

9. Constitutional law (Key 257)

Grand jury (Key 40)

Presence of stenographer and recording of testimony adduced before grand jury is of permissive nature, and failure to make stenographic record did not deprive defendants of rights under Fifth, Sixth and Fourteenth Amendments. U.S.C.A. Const. Amends. 5, 6, 14.

10. Indictment and information (Key 10.2(6))

Grand Jury proceedings are presumed valid unless there is proof rebutting presumption.

11. Indictment and information (Key 144)

Evidence on motion to dismiss indictments established that defendant had not been prejudiced, through effect on grand jury, by publicity surrounding civil disturbance out of which indictments arose.

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12. Grand jury (Key 1)

Grand jury acts as sword so that those who are suspected of wrongdoing may be properly brought to trial and as shield to protect people from arbitrary prosecution.

13. Criminal law (Key 1166(2))

Charge to grand jury considering Newark civil disturbance, pointing out certain acts of lawlessness, was not prejudicial to defendants, where it was not directed at any individual or class of persons.

14. Indictment and information (Key 140(2))

Evidence in proceeding on motions to quash indictments established that grand juries had spent sufficient time deliberating on each case presented. N.J.S. 2A:73-3, N.J.S.A.

15. Indictment and information (Key 10.2(1))

That prosecutor downgraded several cases, by dismissing indictment and filing complaint for lesser offense, did not support inference that there was insufficient evidence before grand jury to indict defendants.

16. Grand jury (Key 41)

Grand jury proceedings are generally secret, and veil of secrecy may be lifted when court is satisfied that policy of secrecy should be subordinate to search for whole truth.

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17. Indictment and information (Key 140(1))

Defendants who charged grand juries with misconduct could be permitted to inquire as to whether there was some legal evidence before grand jury to support indictment and whether grand jury spent sufficient time deliberating on each case.

18. Indictment and information (Key 10.2(7))

Defendants who challenged indictments would not be permitted to inquire as to competency and adequacy of evidence before grand jury.

19. Grand jury (Key 11)

Court was not required to inquire of each grand juror regarding possibility of prejudice against defendants or members of their class.

20. Jury (Key 62(3))

Jury commissioners have discretion in selection of jurors and courts will not substitute their own formula for that chosen by jury commissioners in absence of proof of bad motive.

21. Constitutional law (Key 221)

Jury (Key 33(1))

Juries must be truly representative of community and deliberate and systematic exclusion of Negroes or other qualified class of persons is deprivation of equal protection. U.S.C.A. Const. Amend. 14.

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22. Jury (Key 79(3))

Defendant is not entitled to have one or more persons of his race or class on jury panel, and does not have right to have jury composed in whole, in part, or proportion to any specific racial, economic or geographical group, since he has only right to jury selected without discrimination or bias.

23. Jury (Key 121)

All jury discrimination cases present question of fact.

24. Indictment and information (Key 10.2(6))

There is presumption in favor of validity of indictment and grand jury panel.

25. Indictment and information (Key 140(2))

Defendant who asserts that there has been discrimination in selection of grand jury panel has burden of proving it, but once he establishes *prima facie* case of discrimination, burden shifts to prosecution to explain disparity.

26. Constitutional law (Key 257, 267)

Grand jury (Key 8)

Jury (Key 62(3))

Practices and procedures employed in selection of grand and petit jurors, with prospective grand jurors' names being solicited by "key-man" system from various organizations, with supplementation from voter registration lists, and names of prospective petit jurors being

taken solely from voter registration lists, with no direct evidence for systematic exclusion of Negroes, there being no markings on lists from which names were selected, did not violate Federal Constitution or point to discrimination. U.S.C.A. Const. Amends. 1, 14; Const. 1947, Art. I, par. 8; N.J.S. 2A:69-1, 2, 2A:70-1, N.J.S.A.

27. Indictment and information (Key 140(2))

Evidence in proceeding on motions to quash indictments, indicating disparity between proportions of females and Negroes in county and proportions of Negroes and females chosen as prospective grand jurors, was insufficent to support *prima facie* case of discrimination in selection of grand jury panels.

28. Criminal law (Key 549)

Application of mathematical techniques in proof of facts of criminal case should be approached with caution and restraint.

29. Jury (Key 120)

Evidence showing disparity between proportion of women in county and proportion of women chosen as prospective petit jurors was insufficient to show arbitrary or deliberate exclusion of women from jury lists.

30. Jury (Key 120)

Evidence, including evidence of disparity between proportion of Newark residents to residents of county and proportion of Newark residents chosen as prospective petit jurors was insufficient to establish discrimination. N.J.S. 2A:69-2, subd. g, 2A:70-1, N.J.S.A.

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31. Jury (Key 62(3))

Use of voter registration lists as source of names for jury service is valid even though qualified members of particular class are under-represented on voter registration lists.

32. Jury (Key 120)

Evidence, including evidence of disparity between proportion of Negroes or persons in lower economic status in county and proportion of Negroes or persons of lower economic status chosen as prospective jurors was insufficient to establish systematic exclusion, for lack of evidence of proportion of Negroes and persons of lower economic status on voter registration lists from which jurors were chosen.

Mr. Andrew F. Zazzali, Jr., Assistant Prosecutor for plaintiff, State of New Jersey (*Mr. Joseph P. Lordi*, Essex County Prosecutor, attorney).

Mr. Harris David and Mr. Mark Gasarch for defendants (*Mr. Oliver Lofton*, Director, Newark Legal Services Project, attorney).

GIULIANO, A.J.S.C. This is a consolidated motion to dismiss 98 indictments returned by the 15th and 16th Grand Juries of the September 1966 term sitting during the May 1967 session.

On September 29, 1967 defendant John William Smith filed with the court a motion to dismiss two indictments returned against him by the Essex County grand jury. Each indictment charged him with assault and battery upon a

police officer, contrary to the provisions of N.J.S. 2A:90-4. Therafter, approximately 94 other defendants filed similar motions to dismiss the indictments returned against them by an Essex County grand jury. All the aforesaid indictments involved defendants arrested during the civil disturbance which occurred in Newark, New Jersey, during the month of July 1967. Since all the motions in question involve common questions of law and fact, this court ordered that this matter be consolidated for purposes of argument, presentation and findings. A stipulation to this effect was signed by all defense attorneys and filed with the court on October 10, 1967.

In order that there would be no delay in the disposition of these indictments, the court ordered at the first hearing that all indictments returned against defendants would proceed to trial. Since the filing of this motion, the indictments returned against defendant John William Smith have been disposed of by trial. A jury returned a verdict of guilty on indictment 2678-66, and were in disagreement on indictment 2679-66. Of the remaining indictments, 71 were dismissed on motion of the Essex County Prosecutor, and most of the defendants in this group were charged with a lesser offense under the Disorderly Persons Act. In addition, 16 defendants were tried, convicted and sentenced, 6 were tried and found not guilty, and 1 failed to appear in court and a bench warrant was issued for his arrest. The remaining indictments have not been disposed of at this time.

This motion presents basically four issues concerning (1) the loyalty oath of grand and petit jurors; (2) the lack of a transcript of the grand jury proceedings; (3) the conduct of the grand jury in deliberating and voting on

the indictments in question, and (4) the composition and selection of grand and petit juries. Each issue is discussed in detail under its appropriate heading.

The Oath of the Grand and Petit Jurors

The grand jurors who indicted defendants were required to take an oath pursuant to N.J.S. 2A:73-3. This oath provided in pertinent part as follows:

> "* * * you do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that you are not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates, or advises the use of such means * * *."

Petit jurors are required to take a similar oath as provided in N.J.S. 2A:69-1.1.

[1] Defendants contend that this oath is violative of the Fifth and Fourteenth Amendments to the United States Constitution because it requires neither specific intent to subvert or active membership in subversive groups. Furthermore, they contend that the requirement of this oath causes an unconstitutional exclusion from jury service of those persons who believe in the unlawful overthrow of our government or persons who are inactive members of a subversive organization. Defendants have submitted other arguments in support of this contention, but this court finds them without merit in law and fact. In par-

ticular, defendants contend that the oath denies them the right to be indicted by a grand jury which is constituted in accordance with the Fourteenth Amendment to the Constitution of the United States. The "due process" clause does not require the states to adopt the grand jury system. *Lem Woon* v. *State of Oregon*, 229 U. S. 586, 33 S. Ct. 783, 57 L. Ed. 1340 (1912). Furthermore, a state may abolish grand juries without violating the Fourteenth Amendment. *Hurtado* v. *People of State of California*, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232 (1883). A *fortiori*, a state has considerable latitude in the type of grand jury system it may establish.

In addition, defendants contend in their moving papers that the oath created "an effect of instilling in the minds and consciences of the grand jurors * * * a disregard of the Constitution of the United States." How this "effect" resulted was not explained to the court. Finally, defendants argue that the oath, coupled with the court's charge to the grand jury and certain alleged inflammatory statements by public officials, prejudiced them. As to this argument defendants failed to show how they were prejudiced and did not support this position with accurate authority. Therefore, these contentions were not considered by the court.

On oral argument of this matter counsel stipulated that no defendant is a member of the class of persons allegedly excluded by the oath, *i.e.*, persons who believe in the unlawful overthrow of our government or persons who are inactive members of a subversive organization. In addition, there was no evidence presented to this court that any member of the grand jury which indicted defendants refused to take the required oath and was thereby ex-

cluded from jury service. These facts present the question of whether defendants have standing to challenge the constitutionality of the oaths. Defendants' position is that they have standing to challenge the oath because of its chilling effect on the First Amendment rights of free speech, press, assembly and belief. Thus, they contend they do not have to show prejudice because the oath results in an illegal discrimination and exclusion.

[2] Under the present state of the law as espoused by the United States Supreme Court, a federal court has "never entertained a defendant's objection to exclusions from the jury except when he was a member of the excluded class." *Fay* v. *People of State of New York*, 332 U. S. 261, 287, 67 S. Ct. 1613, 1627, 91 L. Ed. 2043 (1947); *Rawlins* v. *State of Georgia*, 201 U. S. 638, 26 S. Ct. 560, 50 L. Ed. 899 (1906). The apparent rationale for this rule is that if a defendant is a member of the excluded class, the danger of prejudice is great enough for a court to hold that the exclusion is unconstitutional without a showing of actual prejudice. However, if a defendant is not a member of the excluded group, the danger of prejudice is not great. Therefore, before the court will hold the exclusion unconstitutional as to a defendant, it must find that he was actually prejudiced thereby.

This doctrine of standing has been followed in several states. See *State* v. *Lea*, 228 La. 724, 84 So. 2d 169, 170 (Sup. Ct. 1955); *People* v. *White*, 43 Cal. 2d 740, 278 P. 2d 9, 17 (Sup. Ct. 1954), *certiorari* denied 350 U. S. 875, 76 S. Ct. 120, 100 L. Ed. 774 (1956); *Griffin* v. *State*, 183 Ga. 775, 190 S. E. 2 (Sup. Ct. 1937); *Haraway* v. *State*, 203 Ark. 912, 159 S. W. 2d 733 (Sup. Ct. 1942), *certiorari*

denied 317 U. S. 648, 63 S. Ct. 42, 87 L. Ed. 521 (1942); *State* v. *Koritz,* 227 N. C. 552, 43 S. E. 2d 77 (Sup. Ct. 1947), *certiorari* denied 332 U. S. 768, 68 S. Ct. 80, 92 L. Ed. 354 (1947); *State* v. *Jones,* 5 Terry 372, 44 Del. 372, 57 A. 2d 109, 113 (Del. O & T. 1947); *Commonwealth* v. *Duca,* 312 Pa. 101, 165 A. 825 (Sup. Ct. 1933); *State* v. *Clifton,* 247 La. 495, 172 So. 2d 657 (Sup. Ct. 1965). Likewise, this doctrine is the procedural law of New Jersey. *State* v. *James,* 96 N. J. L. 132, 144 (E. & A. 1921). See also *State* v. *Lee,* 74 N. J. L. 852 (E. & A. 1905), affirmed 207 U. S. 67, 28 S. Ct. 22, 52 L. Ed. 106 (1907). The *James* case involved a situation in which women were allegedly excluded from the jury panel by the jury commissioners. The Court of Errors and Appeals held that defendant could not raise the question that the exclusion of women from jury duty violated the Fourteenth Amendment to the United States Constitution because he was not a member of the alleged excluded class. Likewise, in the case at bar defendants cannot raise the question of exclusion because none of them is a member of the excluded class.

[3] On the other hand, defendants contend they need not show actual prejudice by the application of the law or that they are members of the allegedly excluded class, and rely on *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946), and *Ballard* v. *United States,* 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181 (1946). In both these decisions the United States Supreme Court acted in the exercise of its power of supervision over the administration of justice in the federal courts. The question of standing in a state court is to be determined by state law. In addition, defendants rely heavily on the case

of *State* v. *Madison*, 240 Md. 265, 213 A. 2d 880 (1965), wherein the Maryland Supreme Court held that the selection of a grand jury from persons who were required to show their belief in the existence of God was violative of the Federal Constitution. Although the defendant in *Madison* was not a member of the excluded class, *i.e.*, he was a believer in a Supreme Being, the Maryland court maintained that he still had standing to challenge the aforesaid requirement for jury duty. This court finds that *Madison* on this procedural point is not binding in the present case and concludes that defendants herein are required to show prejudice before the oaths in question are declared invalid and unconstitutional.

[4] Since defendants have failed to show prejudice and in view of the above-cited cases this court concludes that defendants do not have standing to challenge the constitutionality of N.J.S. 2A:73-3 and N.J.S. 2A:69-1.1.

Assuming *arguendo*, that defendants do have standing to challenge those statutes, this court is still constrained to find them constitutional for the following reasons:

Loyalty oaths have long been the subject of litigation. Within the past few years this interest was renewed by the United States Supreme Court regarding loyalty oaths required of teachers. See *Keyishian* v. *Board of Regents of University of State of New York*, 385 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 629 (1967); *Whitehill* v. *Elkins*, 389 U. S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 228 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964). *Keyishian* dealt with an oath almost identical to the oath required of grand and petit

jurors in the case at bar. The United States Supreme Court held that the oath as applied to teachers was unconstitutionally vague and violative of the First Amendment to the United States Constitution. It is apparent that the court gave special consideration to the "sensitivity" of a teacher's position in the cademic community. The court, through Mr. Justice Brennan, said:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." (385 U. S., at p. 603, 87 S. Ct., at p. 683)

See also *Sweezy* v. *State of New Hampshire,* 354 U. S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957).

Therefore, this Court must consider whether jurors are also to be given this special consideration. In doing so the court must weigh the State's interest in having loyal jurors against First Amendment rights.

[5-7] Juries, in particular grand juries, have always been considered an arm of the court; they perform a *quasi*-judicial function in our present judicial structure. *In re Jeck,* 26 N. J. Super. 514 (App. Div. 1953). As provided in R.R. 3:3-1 *et seq.*, it is the specific function of the grand jury to find and return an indictment or presentment in open court to the assignment judge. In so doing the grand jury must accept the law as it is written; otherwise the criminal laws would be virtually unenforceable. Likewise, the petit jury must accept the law as it is charged to them

by the trial judge; otherwise their findings would be inconsistent and chaotic. Therefore, in order for the jury system to function, jurors themselves must be loyal to the government and the laws which it promulgates.

[8] When considering the above it becomes apparent that the real interest of the State is in its right to self-preservation. For if the jury fails to function properly and condones criminal acts, anarchy and lawlessness are sure to result and the jury system itself would be destroyed. This court therefore finds that the State's interest of self-preservation necessitates a limitation on First Amendment freedoms in this particular area of our governmetal structure. Limitations on First Amendment Freedoms have been deemed lawful and necessary in similar situations where the State's interest was declared supreme. See, for example, *American Communications Ass'n* v. *Dowds*, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961); *In re Application of Marvin*, 97 N. J. Super. 62 (App. Div. 1967). Therefore, if this issue were properly presented, this court would conclude that the oath required of grand and petit jurors is constitutional and not an unreasonable restriction of First Amendment freedoms.

TRANSCRIPT OF THE GRAND JURY PROCEEDINGS

There was no stenographic record made of the grand jury proceedings which resulted in the indictment of defendants. Movants contend that the failure to make stenographic record or otherwise record these proceedings has deprived defendants of their rights contemplated by

the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. They are unable to cite law in support of this contention.

The present state of the law in the federal courts is that "There is no constitutional requirement that grand jury proceedings be transcribed." *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (2 Cir. 1963). See also *United States* v. *Hensley*, 374 F. 2d 341 (6 Cir. 1967); *McCaffrey* v. *United States*, 372 F. 2d 482 (10 Cir. 1967). The attendance of a stenographer at a grand jury proceeding in the federal courts is permissive rather than mandatory. *United States* v. *Borys*, 169 F. Supp. 366, 368 (D. Alaska 1959); *United States* v. *Rosen*, 259 F. Supp. 942 (S. D. N. Y. 1966).

[9] The law of this State is in accord with the above-cited cases. The presence of a stenographer and the recording of testimony adduced before the grand jury is clearly of a permissive nature. *State* v. *DiModica*, 40 N. J. 404, 412 (1963). Although R.R. 3:3-6 now provides otherwise, this court is compelled to hold that the failure to provide a stenographic record of the grand jury proceedings did not violate any of the constitutional rights of defendants.

THE GRAND JURY PROCEEDINGS

The third major contention of defendants involves alleged misconduct on the part of the 15th and 16th Grand juries and the Court, allegedly resulting in a denial of their rights as guaranteed to them under the Fifth and Fourteenth Amendments to the United States Constitution and N. J. Const. (1947), Art. I, Par. 8, and in violation of N.J.S. 2A:73-3 which sets forth the oath and duties of the

grand jurors. More specifically, defendants contend they were denied the right to an indictment by an impartial grand jury because (1) the grand jury was prejudiced against defendants by the adverse publicity surrounding the Newark civil disturbance; (2) the charge by the court to the grand jury was biased against defendants; (3) the grand jury spent insufficient time deliberating on each indictment, and (4) the court failed to inquire of grand jurors regarding the possibility of their being prejudiced against defendants.

There is no doubt that the Newark civil disturbance and the similar outbreaks of lawlessness which occurred throughout the country during the summer of 1967 received nationwide publicity. Likewise, there is no question that certain public officials made statements condemning the numerous criminal activities which occurred spontaneously at that time. Thus, the question presented is whether this publicity so adversely affected the grand juries which indicted defendants that it caused a violation of due process of law.

In support of this contention that the grand jury was prejudiced against them by the publicity surrounding the Newark disturbances, defendants cite numerous cases regarding a fair trial and free press. These cases are not applicable to the case at bar because they concern themselves with the trial of the case and not the indictment process itself. Furthermore, this line of cases condemns as unconstitutional those situations wherein the trial itself was conducted in a "carnival atmosphere", thereby creating the probability of prejudice abhorent to due process of law. *Sheppard* v. *Maxwell*, 384 U. S. 333, 358, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). See also *Rideau* v.

State of Louisiana, 373 U. S. 723, 83 S. Ct. 1417, 10 L. Ed. 663 (1963); *Turner* v. *State of Louisiana,* 379 U. S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); *Estes* v. *State of Texas,* 381 U. S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).

[10, 11] The proceedings of the grand jury are presumed valid unless proof is submitted to the court which rebuts this presumption. *State* v. *Graziani,* 60 N. J. Super. 1 (App. Div. 1959), affirmed 31 N. J. 538 (1960). In the case at bar there has been no indication to the court that the grand jury proceedings in question were not conducted in the usual solemn manner. Likewise, there has been no evidence presented to the court that any indictment involved herein was the result of bias, prejudice or malice as was condemned in the case of *State* v. *Borg,* 9 N. J. Misc. 59 (Sup. Ct. 1931). On the contrary, the news media merely reported the Newark civil disturbances as accurately as possible under the circumstances. The fact of news publicity alone cannot be said to have created such a "probability of prejudice" that the grand jury proceedings should be deemed "inherently lacking in due process." See *Estes* v. *State of Texas, supra,* 381 U. S., at pp. 542-543, 85 S. Ct. 1628. The court therefore finds that defendants were in no way prejudiced by the publicity surrounding the Newark Civil disturbance.

Defendants further contend that the language of the charge by the court to the 15th and 16th grand juries was biased against defendants. This contention is not supported by any accurate authority. Those portions of the charge claimed objectionable are as follows:

> "The Court has requested that you appear before it this morning to be charged and instructed

relative to the many killings, serious injuries inflicted upon individuals, the burning and destruction of personal property, the plundering and looting of business establishments and general lawless and riotous conduct by many individuals * * *. There is no doubt that certain guarantees and protections cloak all citizens under the Federal and State Constitutions, but these constitutional rights were never meant to be shields for acts of criminality. They were never intended to be licenses for burning, shooting, looting, plundering and murder. * * *

Certain events have taken place in the City of Newark which demand your immediate attention and consideration. I do not have to remind you of the complete disregard for law and order that has been hovering over this municipality. Facts which have come to the attention of the Court indicate a pattern of lawlessness which cannot be permitted to go unnoticed by those charged with the administration of justice * * *"

[12] It is well established in our system of jurisprudence that the grand jury performs a two-fold function. It acts as a sword so that those who are suspect of wrongdoing may be properly brought to trial, and as a shield to protect the people from arbitrary prosecution. *State* v. *Sibilia*, 88 N. J. Super. 546, 550 (Cty. Ct. 1965). In conformance therewith the court charged each grand jury that it was the duty of the grand jury to return an indictment in each instance where the State had presented a *prima facie* case with "due process as the beacon." Likewise, the court charged that where the State failed

to present a *prima facie* case it was equally the grand jury's duty not to indict. The court further charged that

> "You should without fear or favor, prejudice or sympathy examine the evidence presented to you in each case and determine whether or not it merits your returning an indictment against the accused."

[13] When this charge is considered in its totality, this court concludes it did not prejudice defendants, for the charge was in no way whatsoever directed as an attack at any individual or class of persons. The charge merely pointed out that certain acts of lawlessness had occurred in Essex County and as a result thereof each grand jury was summoned to investigate the matter and act in accordance with their oaths.

[14] Defendants further contend that the 15th and 16th grand juries spent insufficient time deliberating on each case presented to them before returning an indictment, thereby resulting in a violation of the grand jurors' oath as set forth in N.J.S. 2A:73-3. This argument is unfounded in fact and law. The 15th grand jury heard cases resulting from the Newark civil disturbances for a period of nine full days. Out of the 386 cases presented to them by the Essex County Prosecutor's Office, 331 true bills were returned to the assignment judge and 55 no bills were found. The 16th Grand Jury heard similar cases for a period of seven full days. Out of the 267 cases presented to this grand jury, 225 true bills were returned to the assignment judge and 42 no bills were found. In every case where an indictment was returned, one or more witnesses appeared and testified before the grand jury. Furthermore, there was sufficient evidence

presented to this court to indicate that the grand juries deliberated and voted accordingly on each and every case presented to them. Although cases were presented to those grand juries by the prosecutor's office with dispatch, there was no evidence in the record to indicate any unlawful practice or procedure. This court therefore concludes that the 15th and 16th grand juries spent sufficient time deliberating and voting on each case presented to them.

[15] After these indictments were returned, many were dismissed by the court on the prosecutor's motion after an amended or new complaint was filed charging the accused with a lesser offense under the Disorderly Persons Act. This procedure is commonly referred to as "downgrading" an indictment. It is employed by the prosecutor only after he has considered the circumstances of the offense charged, the status of the defendant, and whether the best interests of justice will be served by charging the accused with the lesser offense. If the facts warrant, the charge is downgraded. In the past this procedure has proved an effective device for disposing of criminal cases as well as protecting the accused and society. However, it is defendants' contention that the use of this procedure in the instant case was an *indicia* of misconduct on the part of the 15th and 16th grand juries. This court does not agree with this argument, for the sole question presented in downgrading an offense is whether, after considering the facts of the particular case, the best interests of justice will be served by charging the accused with a lesser offense. Downgrading an offense does not depend upon the weight of the evidence. Therefore, the mere fact that several cases were "downgraded" does not permit this court to infer that in those cases there was insufficient evidence before a grand jury to indict the accused.

[16-18] Under the present state of the law, grand jury proceedings are generally considered secret. *State* v. *DiModica*, 40 N. J. 404 (1963). The reasons for grand jury secrecy were aptly stated in the case of *United States* v. *Rose*, 215 F. 2d 617, 628-629 (3 Cir. 1954):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."
>
> (Quoted in *State* v. *DiModica*, *supra*, 40 N. J., at pp. 409-410, and *State* v. *Clement*, 40 N. J. 139-143 (1963))

This veil of secrecy may be lifted when the Court is satisfied under the circumstances of a particular case that the policy of secrecy should be subordinate to the search for the whole truth. *State* v. *Farmer*, 48 N. J. 145, 152 (1966).

Since defendants charged the grand juries with serious misconduct, the Court permitted defendants to inquire as to whether there was some legal evidence before each grand jury to support a return of the indictments in ques-

tion and whether each grand jury spent sufficient time deliberating on each. This is permissible under the law. See *State* v. *Donovan*, 129 N. J. L. 478, 483 (Sup. Ct. 1943). However, this court refused to allow defendants to inquire as to the competency and adequacy of evidence before the grand jury. This is not required by the Fifth Amendment to the United States Constitution. *Costello* v. *United States*, 350 U. S. 359, 363, 76 S. Ct. 406, 100 L. Ed. 397 (1956). Furthermore, to hold otherwise would create undue delay in the trial of criminal cases because the court would have to conduct a preliminary hearing in each case to determine the competency and adequacy of the evidence before the grand jury. As indicated heretofore, there was legal evidence presented to the grand jury in each case where an indictment was returned to the court. Therefore, this court concludes that there was no misconduct on the part of the 15th and 16th grand juries.

[19] Defendants' final contention on this point is that the court was in error for failing to inquire of each grand juror regarding the possibility of prejudice against defendants or members of their class. This argument presents the question whether the court has the duty and responsibility to make such an extensive inquiry of prospective grand jurors. There is no case law or statute which imposes this duty upon the court. At present it is sufficient that the court instruct grand jurors to decide each case on the merits and "without fear or favor, prejudice or sympathy, examine the evidence presented * * * in each case and determine whether or not it merits your returning an indictment against the accused." In addition, grand jurors are required to take an oath pursuant to N.J.S. 2A:73-3, which provides in pertinent part:

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> "• • • that you shall diligently inquire • • • that you shall present no one through envy, hatred or malice; neither shall you leave anyone unpresented for fear, favor or affection, for reward, gain or the hope thereof • • •"

In view of the above procedures this court concludes that the charge, coupled with the required oath, is sufficient to preclude the possibility of prejudice on the part of the grand jury. The court therefore is under no obligation to question grand jurors regarding the possibility of their being prejudiced against a prospective defendant or class of defendants.

The Composition of the Grand and Petit Juries

The defendants' final contention is that the grand and petit juries were improperly and unconstitutionally impaneled. In particular, defendants claim that the procedure employed by the Essex County jury commissioners in the selection of grand and petit jurors resulted in a systematic and deliberate exclusion of Negroes, women, residents of the City of Newark, and persons of lower economic status. Defendants submit that this alleged discrimination deprived them or their rights to an indictment constitutionally found and to trial by jury in accordance with the Fifth and Fourteenth Amendments to the Constitution of the United States and N. J. Const. (1947), Art. I, par. 8. Due to the gravity of this claim, the court conducted an extensive hearing commencing October 9, 1967 to determine the veracity of the above claims. The hearing was concluded on March 22, 1968 upon the filing of supplemental briefs requested by the court.

Appendix F

[20] The New Jersey Legislature has entrusted the jury commissioners of each county with the task of obtaining grand and petit jurors with a view to the "just distribution of jury service among those persons qualified therefor in the various wards and municipalities of the county." N. J. S. 2A:70-1. The jury commissioners are guided by N.J.S. 2A:69-1, which provides the qualifications for jury service, and N.J.S. 2A:69-2, which sets forth exemptions from jury service. Jury commissioners are given discretion in the selection of jurors and the courts will not substitute their own formula for that chosen by the jury commissioners in the absence of proof of "bad motive." *State* v. *Biehl*, 135 N. J. L. 268, 270 (Sup. Ct. 1947); *State* v. *Grundy*, 136 N. J. L. 96 (Sup. Ct. 1947); *State* v. *Stewart*, 2 N. J. Super. 15, 21 (App. Div. 1949).

[21, 22] It is a well established principle of our jurisprudence that juries, as instruments of public justice, be truly representative of the community. *Smith* v. *State of Texas*, 311 U. S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84 (1940); *Glasser* v. *United States*, 315 U. S. 60, 85, 62 S. Ct. 457, 86 L. Ed. 680 (1941); *State* v. *Stewart*, *supra*, 2 N. J. Super., at p. 26. Therefore, a deliberate and systematic exclusion from jury service of Negroes or any other qualified class of persons constitutes a deprivation of equal protection under the Fourteenth Amendment to the Constitution of the United States. *Strauder* v. *State of West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (1880); *Neal* v. *State of Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1880); *Rogers* v. *State of Alabama*, 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417 (1903); *Patton* v. *State of Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1947). However, this principle cannot be taken to mean

that an accused is entitled to have one or more persons of his race or class on the jury panel, for it is equally well settled that the accused only has a right to a jury selected without discrimination or bias towards any particular race or class. No defendant has the right to have a jury composed in whole, in part, or in proportion to any specific racial, economic or geographical group. *Virginia* v. *Rives*, 100 U. S. 313, 25 L. Ed. 667 (1880).

[23, 24] All jury discrimination cases present a question of fact. In the case at bar this court must determine whether the jury commissioners, through their practices and procedure in selecting jurors, deliberately and systematically excluded Negroes, women, residents of the City of Newark and persons of lower economic status. There is a presumption in favor of the validity of the indictment and panel. The defendant who asserts that there has been discrimination in the selection of the jury panel has the burden of proving it. *Martin* v. *State of Texas*, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497 (1905); *Akins* v. *State of Texas*, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1944). Once the movant establishes a *prima facie* case of discrimination, *i.e.*, a significant disparity between those *qualified* for jury service and those of the group actually on the jury lists, the burden of proof shifts to the prosecution to explain this disparity. *Whitus* v. *Georgia*, 385 U. S. 545, 550, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967). However, the indictments should not be dismissed except on the cleartest and plainest grounds. *Cf. State* v. *Chandler*, 98 N. J. Super 241, 245 (Cty. Ct. 1967).

This court must now examine the practices and procedures employed by the Essex County jury commissioners

and their staff in obtaining grand and petit jurors. Since the procedure of selecting grand and petit jurors differ, they shall be dealt with separately.

Names of prospective grand jurors are obtained by the jury commissioners, who solicit such names from various civic organizations, churches, labor unions, phone books and various other organizations including the National Association for the Advancement of Colored People. This system is commonly referred to as the "key-man" system. Although this system is somewhat outmoded, this court has found no case declaring it to be unconstitutional *per se*. After these names are supplied to the jury commissioners they are turned over to their staff who, in turn, send an objective questionnaire to the prospective grand jurors. Form, see R.R. 1:29-2. The questionnaire requests answers to certain questions regarding the prospective juror's background in order that it may be determined whether he is qualified pursuant to N.J.S. 2A:69-1, or exempt from jury service pursuant to N.J.S. 2A:69-2. After the staff, under the supervision of the jury commissioners, makes this determination, the names are placed on the master list. Generally the names supplied by the jury commissioners prove insufficient. In such instances members of the staff, at the direction of the jury commissioners, go to the superintendent of elections office and obtain additional names from the Voter registration list or take names not used in prior lists. Generally, names taken from the voter registration list in this instance are persons residing in Newark. There is no marking to indicate race, color, creed or ethnic background on either the questionnaire, master list, or voter registration list. The grand jury master list usually contains approximately 300 names. The final selection of who will serve on the grand

jury is done by drawing 50 of the 300 names from a roll box in open court in the presence of a judge.

Names of prospective petit jurors are taken solely from the voter registration lists of Essex County. The voters' names are on addressograph plates in the office of the superintendent of elections for Essex County. Each plate contains the name, address, district and ward of each registered voter, and the plates are arranged on trays by ward and district, street number first and then alphabetically by name. The voter registration printed lists are made up from the addressograph plates and are arranged in the same manner as the plates. Since 1966 the staff, at the direction of the jury commissioners, has prepared petit jury lists by selecting names in a given alphabet range from the addressograph plates. For example, in 1967-1968 the jury commissioners' staff authorized the use of the letters M to R in preparing the petit jury panels. The staff went through the plates and sought the names beginning with those letters. They then placed each name on a standard questionnaire and a blank card. If a large family of registered voters appeared on the plates, only two names would be chosen without regard to sex. The questionnaire was then mailed to the prospective juror after the staff checked the name against the city directory to determine if the prospective juror had an excludable occupation. If so, the questionnaire was not mailed. The blank cards were retained by the staff as a record indicating to whom questionnaires were sent. Prior to 1966 the printed voter registration list rather than the addressograph plates were employed for this purpose.

Approximately 35,000 questionnaires are mailed out to prospective petit jurors in the various wards and munici-

palities of the county at the beginning of each year.[1] The

[1] Questionnaires are mailed a year in advance to preparing the petit jury master lists for a particular term of court. Following is a schedule of the 1965 and 1966 total mailings, which names were used to compose the 1966 and 1967 petit jury master lists:

	1965 for 1966			*1966 for 1967*		
Municipality	*Male*	*Female*	*Total*	*Male*	*Female*	*Total*
Belleville	685	193	878	1141	283	1424
Bloomfield	881	396	1277	1536	644	2180
Caldwell	226	110	336	268	125	393
Cedar Grove	399	68	467	457	114	571
East Orange	1530	522	2052	2249	852	3101
Essex Fells	102	77	179	135	89	224
Fairfield	134	20	154	201	29	230
Glen Ridge	227	140	367	352	184	536
Irvington	1427	422	1849	2132	421	2553
Livingston	927	132	1059	850	399	1249
Maplewood	888	354	1242	989	396	1385
Millburn	657	254	911	864	264	1128
Montclair	717	400	1117	927	442	1369
Newark	5163	1625	6788	8728	2887	11615
North Caldwell	156	47	203	194	44	238
Nutley	755	254	1009	935	354	1289
Orange	575	190	765	1236	474	1710
Roseland	113	68	181	171	50	221
South Orange	507	301	808	610	338	948
Verona	528	169	697	614	159	773
West Caldwell	308	114	422	421	133	554
West Orange	906	379	1285	1406	603	2009

number of questionnaires mailed annually varies in accordance with the needs of the court for petit jurors. Out of this total number, approximately 3,000 questionnaires are returned "Address Unknown", and an additional 15% of the total number mailed receive no response. The majority of these questionnaires returned "Address Unknown", or those which receive no response are addressed to Newark residents. Questionnaires which are returned are reviewed by the staff with the approval of the jury commissioners. Those persons who do not qualify or are exempt from jury service are not placed on the list. The names of those persons who do qualify are placed on IBM cards and then into a computer which sorts and shuffles the cards at the request of and in the presence of the court and jury commissioners and produces the names of persons selected as jurors.

[25, 26] The procedure heretofore discussed is unlike any procedures condemned as unconstitutional by our federal courts. For example, in *Whitus* v. *Georgia, supra,* prospective jurors' names were chosen from a tax digest on which a "C" was placed after every Negro name. In addition, there was a significant disparity between the percentage of Negroes on the tax digest (27.1%) and that on the grand jury venire (9.1%) and the petit jury venire (7.8%) which strongly pointed to a conclusion of discrimination. Likewise, in *Avery* v. *Georgia,* 345 U. S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953), not only was the source of prospective jurors' names maintained on a racially segregated basis, but also the names of prospective Negro jurors were placed in the jury box on yellow colored tickets. In both the aforesaid cases, it was primarily the procedure employed in selecting jurors that

pointed to the conclusion of discrimination. See also *Arnold* v. *North Carolina*, 376 U. S. 773, 84 S. Ct. 1032, 12 L. Ed. 2d 77 (1964); *Norris* v. *State of Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935).

There are several other cases in which a long and continued absence of Negroes on the jury lists brought the court to a conclusion of discrimination. See, for example, *Pierre* v. *State of Louisiana*, 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757 (1939); *Patton* v. *State of Mississippi*, *supra*. The case at bar differs from both of these situations. There was no direct evidence presented to the Court which indicated that the jury commissioners or their staff deliberately and systematically excluded Negroes from the jury panels. Likewise there was no marking as to race, color or ethnic background on the source from which names were obtained, *i.e.*, the voter registration lists, addressograph plates of registered voters, printed list of registered voters or master list. The only questionable practice is the "key-man" system, which involved the partial selection of grand jurors from community sources by the jury commissioners. However, even in this instance there was no indication of discrimination for the names were solicited by the jury commissioners from varied sources, including Negro and labor organizations.[1] Likewise the names so supplied to the commissioners were not earmarked by race or otherwise. In addition, there has been no continued absence of Negroes on our grand and petit juries. On the contrary, there was ample testimony in the case at bar that there has always been Negro representation on the grand jury panels. In fact, there were three Negroes on the 15th grand jury and one Negro on the 16th. This court therefore concludes that the practices and procedures employed by the jury commissioners in

the selection of grand and petit jurors is not violative of the Federal Constitution nor does such procedure point to a conclusion of discrimination towards any race or class of individuals.

Since there is nothing unconstitutional about the jury selection procedure *per se*, the next question presented is whether there is such significant under-representation on the jury lists of Negroes, women, residents of the City of Newark and persons of lower economic status as would strongly point to a conclusion of discrimination. If so, there is the further question whether such under-represntation establishes a *prima facie* case of discrimination, thereby rebutting the presumption of validity of the jury panels and shifting the burden of proof to the prosecution to explain the disparity. See *Whitus* v. *Georgia, supra,* 385 U. S., at p. 550, 87 S. Ct. 643.

During the hearing heretofore mentioned, the composition of the grand and petit juries was determined by the use of statistics and what is commonly called a "random sample technique." For the purpose of determining the composition of the grand jury, this court considered the four past grand jury master lists, *i. e.*, from May 1966 to May 1967. The lists totalled 1,200 names and defendants used a sample of 300 names to determine race, sex, residence and occupational background of the jury panels. The sample indicated that of the names on the grand jury master list, 25.0% were female (21.8% by actual count), 26.7% were residents of Newark (26.9% by actual count), and 6% were Negro (by sample only). The average occupational breakdown on the aforesaid jury lists was approximately 39% professional, 16% manager, 9% clerical, 9% sales, 2% craftman, 2% operative, 2% household, 1.5%

laborer, .5% unemployed, 7.5% housewife, 11% retired, and .5% self-employed. The largest classification was "professional" and included over 100 professions or occupations.

According to the population statistics furnished by defendants, the breakdown of the Essex County population between the age of 21 and 74 years indicates that 52.2% are female, 41.7% of the county population reside in Newark, and 17% of the county population are Negro.

[27] The occupational breakdown of the Essex County labor force is as follows: professional 11.55%, manager 8.20%, clerical 16.47%, sales 7.41%, craftman 11.56%, operative 20.19%, household 9.93%, laborer 4.03%, unemployed 2.51%, housewife (not considered in labor force), retired (not considered in labor force), and self-employed 8.15%. There were no statistics introduced in evidence to indicate the number of persons qualified for jury service in any of the aforesaid classifications. For example, there was no evidence to indicate the number of persons classified in "craftman" who were eligible or qualified for jury service. There was no evidence presented to indicate to this court the percentage of those persons in each class who were not qualified for jury service or were exempt from it. In addition, there were no statistics presented to the court to indicate the percentage of persons in each class who were or were not registered to vote in the County of Essex. There is a probable inference that the composition of the grand jury panels was a result of the legitimate application of statutory standards of qualifications and exemptions. Thus, if this court were to find discrimination in the case at bar based solely on the aforesaid statistics, that conclusion would be founded on mere

conjecture and speculation.' Furthermore, to expect the jury commissioners to provide a perfectly balanced jury list would be to impose an Herculean task upon them. This court therefore concludes that there is insufficient evidence to support a *prima facie* case of discrimination in the selection of the grand jury panels.

[28] Additional evidence was introduced to indicate the probability of observing the present composition of the grand jury. For example, defendants' statistician testified that assuming Negroes between the ages of 21 and 74 years comprise 17% of the Essex County population, the probability of observing 6% or less Negroes on a given grand jury list is less than one in a million. The same statistician also testified that he would expect to find on a grand jury master list of 300 names, 12.7% to 21.3% Negroes 95% of the time. The court is not impressed with these statistics because defendants' statistician admittedly did not consider all of the qualifications for jury service or exemptions from jury service. Namely, defendants' statistician did not consider the percentage of Negroes, women, residents of Newark and persons of lower economic status between the ages of 21 and 74 years who were disqualified from jury service because they were: (1) not a resident of this State for at least two years; or (2) not a resident of Essex County; or (3) convicted of a crime, or (4) not able to read, write and understand the English language; or (5) they had a mental or physical disability which would prevent them from properly serving as jurors. N.J.S. 2A:69-1. Likewise, defendants' statistician did not consider the percentage of persons in each of the aforesaid groups who would be exempt from jury service by virtue of the fact that they were: (1) a member or employee of a police force or fire department, or (2) a member of the

state or federal military forces, or (3) employed as a school teacher, or (4) entrusted with the care and custody of a minor child and jury service would interfere with the care required of such child. N.J.S. 2A:69-2. These factors would significantly decrease the number of qualified persons in each of the aforesaid groups. Therefore, since the validity of these statistics is so tenuous, this court finds them inconsequential on this motion. The application of mathematical techniques in the proof of facts of a criminal case should be approached with caution and restraint. See *People* v. *Collins*, 66 Cal. Rptr. 497, 438 P. 2d 33 (Cal. Sup. Ct. 1968); but see "The Application of Statistical Decision Theory to the Jury Discrimination Cases," *Harv. L. Rev.* 338.

This court now turns to the composition of the petit jury. It has considered the four petit jury master lists for May 1966 to May 1967 consisting of approximately 18,000 names, Since the voter registration lists are the source for the petit jury lists, it is incumbent upon this court to know the composition of those lists. If a particular group of persons fails to register to vote, it is not the result of discrimination that the particular group is not represented on the jury panels. The evidence indicates that in 1967 53.9% of the voters registered in Essex County were women and 33.3% of all voters residents of Newark. There was on evidence introduced to indicate the number of Negroes registered to vote in this county or the number of registered voters in each of the occupational classifications heretofore discussed in the selection of the grand jury.

[29] A review of the record indicates that out of all the questionnaires mailed for the 1966 lists, 26.3% were sent

to women, and for the 1967 lists, 26.1% were sent to women. The resulting average of women on the four petit jury lists was 22.7%. The apparent cause of this disparity is two-fold. First of all, N.J.S. 2A:69-2(g) provides that

> "Any person who has the actual physical care and custody of a minor child and who gives written notice to the jury commissioners of the county of his residence that jury service would interfere with the care required for such child shall be exempt • • •."

Naturally, many more women than men fall into this category of exemption, thereby explaining the imbalance. Furthermore, where a family's name appears on the voter registration lists, the jury commissioners' staff would only choose one or two members of that family to serve on jury duty. In many instances the male name was chosen to alleviate the burden of service on women entrusted with the care of minor children. Although a disparity resulted by use of the aforesaid procedure, this court cannot dismiss the indictments on this ground in the absence of showing that the jury commissioners were arbitrary or deliberate in their exclusion of women from the jury lists, or that their action was probably harmful to defendants' substantive rights. *Butler* v. *State*, 229 N. E. 2d 471 (Ind. Sup. Ct. 1967).

[30] N.J.S. 2A:70-1 provides in pertinent part that the jury commissioners are to prepare grand and petit jury lists with a due regard to "the just distribution of jury service among those persons qualified therefor in the various wards and municipalities of such county." In

compliance therewith the jury commissioners sent questionnaires for jury service to residents of every municipality in the county.[2] Of the total questionnaires sent to prepare the 1966 petit jury lists, 28.2% were sent to Newark residents. Of the total questionnaires sent to prepare the 1967 petit jury lists, 31.2% were sent to Newark residents.[3] The approximate percentage of Essex County Voters residing in Newark in 1966 34.7% and in 1967 was 33.3%. This leaves a 2.1% disparity in the 1967 mailing and a 6.5% disparity in the 1966 mailing. It must be noted that the voter registration list also includes persons not qualified for jury service because they are over 74 years of age and persons exempt from jury service because of their occupation. The court therefore finds this disparity insufficient to infer discrimination.

[31] Additional evidence was introduced which indicates that the petit jury master lists contained an average of approximately 20.3% residents of Newark after mailing. Defendants contend this under-representation is the result of using the voter registration lists as a source of names since the percentage of Newark residents registered to vote is less than the percentage of Newark residents in the general population. The court finds this argument

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[2] See footnote 1, *supra*.

[3] The total number of registered voters in Essex County for 1967 was 402,536. Newark had 133,964 registered voters, whereas the total number of registered voters in the suburbs was 268,572. Thus, suburban registered voters outnumber Newark voters by approximately a 2 to 1 ratio. (It is also interesting to note that the Central Ward of Newark had the least amount of registered voters when compared to the other wards in the city).

without merit. Those who fail to register to vote in this county eliminate themselves from jury service. See: *Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate*, 19th Cong., 1st Sess. 43 (1967). Recently the Federal Government passed into law the Jury Selection and Service Act of 1968, 28 U.S.C.A. § 1861 *et seq.* This federal statute approves the use of the voter registration lists as the source of names for jury service and indicates it is the most effective means of obtaining juries which reflect a fair cross-section of the community. This court agrees with the policy expressed in the federal statute and holds that the use of voter registration lists as a source of names for jury service is a valid method of preparing jury lists, even though qualified members of a particular class of persons are under-represented on the voter registration lists.

[32] This court now turns to the question of the alleged disparity between the number of Negroes qualified for jury service and those actually on the petit jury master lists. A sample from the petit jury lists of May 1966 to May 1967 was taken by selecting every 16th name and then personally interviewing the jury to determine his or her race. The sample totalled 299 names out of a universe on the four lists of approximately 18,000 names. The result of this sample showed 8.36% to be Negro. There was no evidence introduced to the court which indicates the number of qualified Negroes registered to vote in Essex County. Therefore, this court is without sufficient evidence to determine if a significant disparity exists between the number of Negroes qualified for jury service and the number of Negroes who actually served on the

petit jury. As indicated heretofore, Negroes comprise 17% of the general population of Essex County between the ages of 21 to 74 years. When comparing this figure of 17% with the result of the sample (8.36%), one finds a disparity of 8.64%. This court cannot conclude that this disparity is the result of a systematic and deliberate exclusion of Negroes. There is the strong probability that this segment of the Negro population is not qualified for jury service, or is exempt from jury service, or has simply failed to register to vote. This court therefore concludes that defendants have failed to establish a *prima facie* case of jury discrimination against Negroes in the case at bar.

The aforesaid reasoning applies equally to the question of whether there is a significant disparity between the percentage of persons of lower economic status qualified for jury service and persons of that group who actually serve on jury duty. Again, defendants failed to introduce in evidence statistics which indicate the percentage of persons of lower economic status who are qualified for jury service or who are registered to vote in this county. Therefore this court concludes that the defendants' statistics do not prove a policy or "formal method" of total and systematic exclusion of persons of lower economic status. See *Fay* v. *People of State of New York*, 332 U. S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947). In addition, the case at bar differs materially from *Labat* v. *Bennett*, 365 F. 2d 698 (5 Cir. 1966), cited with emphasis by defendants. In *Labat* the Court found that there was a policy of "systematic total exclusion of daily wage earners as a class." (at p. 721). In the instant case there was significant representation of persons of lower economic status on the petit jury master lists. Therefore, this

Court finds that defendants have failed to show a systematic or deliberate exclusion of persons of lower economic status from petit jury service.

In conclusion, defendants' motions to dismiss the indictments herein are denied.